

# PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to

submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

**Symbols in proposed rule text.** Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

## TITLE 1. ADMINISTRATION

### PART 1. OFFICE OF THE GOVERNOR

#### CHAPTER 3. CRIMINAL JUSTICE DIVISION

##### SUBCHAPTER H. TEXAS CRIME STOPPERS PROGRAM

###### **1 TAC §§3.9000, 3.9005 - 3.9007, 3.9011, 3.9015, 3.9017, 3.9019, 3.9021, 3.9025**

The Texas Crime Stoppers Council (Council) proposes amendments to 1 TAC §§3.9000, 3.9005 - 3.9007, 3.9011, 3.9015, 3.9017, 3.9019, and 3.9021, concerning the functions of the Council under Chapter 414 of the Texas Government Code. The Council also proposes a new rule at 1 TAC §3.9025, concerning the use of excess funds by crime stoppers organizations under §414.010(d) of the Texas Government Code.

###### EXPLANATION OF PROPOSED AMENDMENTS AND NEW RULE

The Council is responsible for encouraging, advising, and assisting in the creation of crime stoppers organizations (organizations) and the implementation of their programs, as well as fostering the detection of crime and carrying out other duties described in Chapter 414 of the Texas Government Code. The primary purpose of the proposed amendments to the existing rules is to update policies and procedures to provide a smoother operating framework for the Council and the organizations. The proposed amendments, as well as the new rule, are also in response to statutory revisions to the Texas Government Code enacted by the 86th Legislature, Regular Session, in House Bill 3316 (HB 3316).

The proposed amendments to 1 TAC §3.9000 would adjust the timing and required documentation for an organization to submit, and the Council to take action on, the organization's application for continuing certification, as well as how such renewal process affects the organization's existing certification. The Council also proposes to allow the director of the Council (Director) or the Council to specify other information for inclusion in applications for certification at their discretion, and to change the applicable accounts and timing of financial statements that must be included in applications for continuing certification. The Council further proposes to allow organizations applying for renewal of their certification to complete their training requirements at any point during their current certification, instead of twelve months prior to application, as is the current standard.

The proposed amendments to §3.9005 would allow the Chairman, in addition to the Council itself, to notify an organization that the Council will consider its decertification at an upcoming

meeting and would clarify the content of such notice. In addition, the Council proposes to create a process through which the Director can address risk of noncompliance with the laws and rules governing crime stoppers organizations by either placing an organization on a corrective action plan or recommending it to the Council for decertification. The proposed amendments to §3.9015 would also implement this process to address any noncompliance that was identified by the Office of the Governor, Criminal Justice Division, while conducting a financial or programmatic review or audit of the organization.

The proposed amendments to §3.9006 would clarify how an organization's certification expires or is not renewed and would also clarify the content of the notice to an organization that the Council is considering the renewal of its certification.

The proposed amendments to §3.9007 would allow more flexibility in determining the effective date of decertification for organizations that are winding down or not seeking to renew their certification. The Council further proposes to amend §§3.9005 - 3.9007 to implement new close-out reporting requirements for de-certified, expiring, and dissolving organizations.

The Council's current rules at §§3.9010, 3.9011, and 3.9013 require organizations to report certain information to the Council or the Director. The proposed amendments to §3.9011 would add the reporting requirements from §§3.9010 and 3.9013, which are proposed for repeal in another notice, to §3.9011 to consolidate reports. The Council also proposes to allow the Director or the Council to request additional information in the annual report, change the frequency of the required statistical report from quarterly to semi-annually, and require a report within 30 days if an organization changes the composition of its executive board or its executive director (if applicable) or law enforcement coordinator.

The Council's current rules at §§3.9017, 3.9019, and 3.9021 contain procedures for merging organizations and changing the territory of a certified organization. The proposed amendments to §§3.9017, 3.9019, and 3.9021 would give the Council and the Director discretion to request any other helpful information in assessing the mergers or expansions, as applicable, and would require merging or expanding organizations to provide reviews of all financial accounts over a different time period, but no longer require that financial reviews be conducted by a certified public accountant. The Council further proposes to clarify the continuing certification process for merging and expanding organizations. The proposed amendments to §§3.9017 and 3.9019, in particular, would allow the Director to specify which merger, dissolution, and compliance forms should be submitted, and would make other changes to reflect that more than one excess funds account can be created. Other proposed amendments to §3.9019 would allow a previously certified organization to submit additional forms of proof that it repaid outstanding

fees to the Office of the Comptroller. The Council also proposes to require interest from a law enforcement agency, rather than the citizens, of an area seeking to join an existing organization under the proposed amendments to §3.9021. Finally, the Council proposes to end a prohibition on merged organizations establishing excess funds accounts in the first three years after their merger.

The existing rules that the Council proposes to amend are revised to update the rule based on current statute and to make other clean-up changes, such as to defined terms and cross-references.

As enacted by the 86th Legislature, Regular Session, HB 3316 removed from statute the formula for determining the amount of funds that organizations could move from their rewards accounts into excess funds accounts, and instead left such amount to be determined by Council rule. HB 3316 also provided for the Council to issue rules explaining the "law enforcement or public safety purposes relating to crime stoppers or juvenile justice" for which excess funds may be used. The proposed new §3.9025 sets out the formula for funds that may be deposited into excess funds accounts and defines such law enforcement or public safety purposes.

#### FISCAL NOTE

Margie Fernandez-Prew, Director of the Texas Crime Stoppers Council, has determined that for each year of the first five years in which the proposed amendments and new rule are in effect, there are no expected fiscal implications for the state or local governments as a result of enforcing or administering the proposed amendments and new rule. Ms. Fernandez-Prew has further determined that the proposed amendments and new rule may affect certain local economies and geographic areas differently than other local economies and geographic areas depending on which areas have organizations in operation. But the effect on any particular local economy or geographic area is unknown. There is no anticipated effect on local employment or local economies as a whole because the aggregate amount of expenditures made by organizations should remain unchanged as a result of the proposed amendments and new rule.

#### PUBLIC BENEFIT AND COSTS

Ms. Fernandez-Prew has also determined that for each year of the first five years in which the proposed amendments and new rule are in effect, the public benefit anticipated as a result of enforcing or administering the proposed amendments and new rule will be to implement the statutory changes made by HB 3316 and to allow the Council greater efficiency in administering their operations and certifying and assisting organizations. There are no anticipated economic costs to persons required to comply with the proposed amendments and new rule. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, therefore, preparation of an economic impact statement and a regulatory flexibility analysis is not required.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Finally, Ms. Fernandez-Prew has determined that for each year of the first five years in which the proposed amendments and new rule are in effect, the amendments and new rule will have the following effect on government growth. Neither the proposed amendments nor the new rule will create or eliminate any government programs or employee positions. Additionally, neither the proposed amendments nor the new rule will require

an increase or decrease in future legislative appropriations to the Council or change any fees paid to the Council. The proposed new rule creates a new regulation at §3.9025 in response to statutory changes enacted by HB 3316. The proposed amendments expand certain existing regulations, including by giving the Director authority to place an organization that is at risk of no longer meeting the certification requirements or duties on a corrective action plan. The proposed amendments also limit other existing regulations in that they streamline and clarify certification and review requirements. While no rules are repealed in their entirety in this notice, the proposed amendments do remove the ability to extend the certification period for an organization, the requirement that financial reviews be conducted by a certified public accountant, the limitation on merging organizations from forming excess funds accounts, and other changes in order to update to the current statute. Furthermore, neither the proposed amendments nor the new rule increases or decreases the number of individuals subject to the applicability of the rules. The proposed amendments and new rule are not anticipated to affect this state's economy.

#### SUBMITTAL OF COMMENTS

Written comments regarding the proposed rule amendments or new rule may be submitted to Margie Fernandez-Prew, Office of the Governor, Texas Crime Stoppers Council, P.O. Box 12428, Austin, Texas 78711 or to [txcrimestoppers@gov.texas.gov](mailto:txcrimestoppers@gov.texas.gov) with the subject line "Council Rules." The deadline for receipt of comments is 5:00 p.m. CST on February 3, 2020. All requests for a public hearing on the proposed rule amendments or new rule, submitted under the Administrative Procedure Act, must be received by the Council no more than fifteen (15) days after the notice of proposed changes and additions in the sections have been published in the *Texas Register*.

#### STATUTORY AUTHORITY

The amendments and new rule are proposed under Government Code, §414.006, which provides that the Council may adopt rules to carry out its functions under that chapter.

#### Cross Reference to Statute:

Chapter 414, Government Code, as amended by House Bill 3316, 86th Legislature, Regular Session.

#### *§3.9000. Certification.*

(a) The Texas Crime Stoppers Council (Council) shall, on application by a crime stoppers organization as defined by §414.001(2) of the Texas Government Code (organization), determine whether the organization meets the requirements to be certified to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A [~~Article 42.12~~] of the Texas Code of Criminal Procedure.

(b) The Council shall[; ~~in its discretion;~~] certify a crime stoppers organization to receive those repayments or payments if, considering the organization, continuity, leadership, community support, and general conduct of the organization, the Council determines that the repayments or payments will be spent to further the crime prevention purposes of the organization.

(c) Certification is valid for two years from the date of issuance or, if applicable, the effective date of continued certification. The Council may take action on a crime stoppers organization's Application for Continuing Certification prior to the expiration of the organization's current certification, and specify the effective date of the continued certification, provided that the effective date is no later than the expiration date of the current certification. If a crime stoppers or-

ganization's certification expires, the organization is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A [Article 42.12] of the Texas Code of Criminal Procedure, until the organization obtains certification. [The two-year certification period may be extended under the following circumstances:]

{(1) If an organization's application to renew its certification is received by the director of the Council before the two-year certification period expires, the organization's certification shall continue in effect until the Council makes a decision regarding the renewal of its certification.}

{(2) The chairman of the Council may extend the two-year certification period for a period of time not to exceed 90 days if:}

{(A) one of the following extenuating circumstances occurs before the two-year certification period expires:}

{(i) natural or man-made disaster;}

{(ii) serious illness, incapacity, or death of the chairman, treasurer, or secretary of the organization's board of directors;}

{(iii) serious illness, incapacity, or death of one of the organization's law enforcement/civilian coordinators; or}

{(iv) death of a member of the immediate family of one of the officials listed in clauses (ii) and (iii) of this subparagraph;}

{(B) one of the extenuating circumstances listed in subparagraph (A) of this paragraph has a detrimental effect on the organization's ability to submit an application for certification before the two-year certification period expires; and}

{(C) the director of the Council receives the organization's written request to extend the certification period no later than 20 calendar days after one of the extenuating circumstances listed in subparagraph (A) of this paragraph occurs.}

(d) A private, nonprofit crime stoppers organization must submit the following information to the director of the Council in order to obtain initial certification:

(1) Documentation from the Internal Revenue Service granting the organization tax-exempt status;

(2) Proof that the following persons completed a training course provided by the Criminal Justice Division of the Office of the Governor (CJD) [CJD] and the Council, or their designee, within the year prior to submission of the organization's [its] application for certification:

(A) one member of the organization's board of directors; [;] and

(B) one of the organization's law enforcement/civilian coordinators; and

(C) the executive director of the organization (if applicable);

(3) A completed and signed Conditions of Certification Form;

(4) The name, mailing address, email address, telephone number, occupation, and board position of each member of the organization's board of directors;

(5) The name, mailing address, email address, and telephone number of each of the organization's law enforcement/civilian coordinators;

(6) The name, mailing address, email address, telephone number, and occupation of the executive director (if applicable); [and]

(7) The description of the geographic territory or jurisdiction to which the organization desires to provide services; and

(8) Any additional information requested or specified by the Council or the director of the Council.

(e) A public crime stoppers organization must submit the following information to the director of the Council in order to obtain initial certification:

(1) Proof that one of the organization's law enforcement/civilian coordinators completed a training course provided by CJD and the [Texas Crime Stoppers] Council, or their designee, within the year prior to submission of the organization's [its] application for certification;

(2) A completed and signed Conditions of Certification Form;

(3) The name, mailing address, email address, telephone number, occupation, and board position of each member of the organization's governing board;

(4) The name, mailing address, email address, and telephone number of each of the organization's law enforcement/civilian coordinators;

(5) The name, mailing address, email address, telephone number, and occupation of the organization's executive director (if applicable); [and]

(6) The description of the geographic territory or jurisdiction to which the organization desires to provide services; and

(7) Any additional information requested or specified by the Council or the director of the Council.

(f) If the organization is currently certified by the Council, the organization must submit the documentation described in subsection (d) or (e) of this section, as applicable, with the exception of the training documentation required by subsections (d)(2) and (e)(1) of this section, and the following additional information [every two years] as part of its Application for Continuing [Continued] Certification, in each case no more than 240 days and no less than 180 days prior to the expiration of the current certification:

(1) [financial] statements for all financial accounts covering the [two-year certification] period from the beginning of the calendar year of the date of submission of the previous application to the present, showing beginning and ending balances for each calendar year and the current year-to-date, for all accounts containing funds originally obtained from repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A of the Texas Code of Criminal Procedure, on a form prescribed by the Council;

(2) documentation from the relevant courts or government agencies stating the amount of probation fees disbursed to the organization during the [two-year certification] period described in paragraph (1) of this subsection;

(3) any Crime Stoppers Program Annual [Probation Fee and Repayment] Reports that have not been submitted to the director of the Council as required by §3.9011 [§3.9010] of this chapter; [and]

(4) any [Quarterly] Statistical Reports that have not been submitted to the director of the Council or the Council's designee as required by §3.9013 of this chapter;

(5) proof that the following persons completed a training course provided by CJD and the Council, or their designee, after the date of issuance or the effective date, as applicable, of the current certification:

(A) one member of a private, nonprofit organization's board of directors (if applicable);

(B) one of the organization's law enforcement/civilian coordinators; and

(C) the executive director of a private, nonprofit organization (if applicable); and

(6) any additional information requested or specified by the Council or the director of the Council.

(g) Certification awarded to an organization is awarded only as to the specific geographic territory or jurisdiction described in the certification award.

(h) Decisions regarding the certification of crime stoppers organizations shall be made by the Council.

(i) The Council reserves the right to consider and take action on an incomplete Application for Continuing Certification if the Council determines from the information provided that the crime stoppers organization meets the certification requirements described in §414.011, Texas Government Code.

#### §3.9005. *Decertification.*

(a) During the two-year certification period, the Council shall ~~[Texas Crime Stoppers Council (Council) may, in its discretion,]~~ decertify a crime stoppers organization if it determines that the organization no longer meets the certification requirements described in §3.9000(b) ~~[§3.9000]~~ of this chapter, which may include a violation of state law, federal law, or Subchapter H of this chapter.

(b) If a crime stoppers organization is decertified by the Council, the organization is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A ~~[Article 42-12]~~ of the Texas Code of Criminal Procedure.

(c) The Council, or the Chairman of the Council, shall send written notification to the crime stoppers organization no later than 45 calendar days prior to the meeting at which the Council will consider the decertification of the organization. The written notification shall include the following:

(1) Reasons why the organization may no longer meet ~~[Any noncompliance with]~~ the certification requirements described in §3.9000(b) of this chapter; and

(2) The date, time, and location of the meeting at which the Council will consider the decertification of the organization.

(d) The crime stoppers organization shall submit a written response, which shall include an explanation and specific reasons why the organization believes that it should not be decertified. The written response must be received by the director of the Council at least 10 calendar days prior to the meeting at which the Council will consider the decertification of the organization.

(e) The Council shall render a decision regarding the decertification of the crime stoppers organization and shall notify the organization in writing of its decision.

(f) If a crime stoppers organization is decertified, the director of the Council shall notify the state comptroller, and the relevant courts, county auditors and community supervision and corrections de-

partments in the organization's region, that the organization is decertified and is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A ~~[Article 42-12]~~ of the Texas Code of Criminal Procedure.

(g) Not later than the 60th day after the date of decertification of the organization, the decertified organization shall forward all unexpended money received pursuant to §414.010 of the Texas Government Code ~~[under this section]~~ to the state comptroller and shall submit reports as required in §3.9011(b)(5) and §3.9011(d) of this chapter, covering the period since the last submitted reports, and any other information prescribed by the director of the Council or the Council.

(h) The director of the Council may determine that a certified crime stoppers organization is at risk of no longer meeting the certification requirements or duties described in §3.9000 of this chapter. If the director of the Council makes such a determination, the director of the Council may place the organization on a corrective action plan that specifies actions to be taken by the organization by a specified time, or the director of the Council may recommend to the Council that the organization be considered for decertification.

#### §3.9006. *Expiration or Non-Renewal of Certification.*

(a) At the end of the two-year certification period, ~~[the Texas Crime Stoppers Council (Council) may, in its discretion, allow]~~ a crime stoppers organization's certification will ~~[to]~~ expire ~~[or vote to not renew its certification]~~.

(b) If a crime stoppers organization's certification expires or is not renewed, the organization is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A ~~[Article 42-12]~~ of the Texas Code of Criminal Procedure.

(c) If an organization has submitted a timely application to renew its certification:

(1) The Council shall send written notification to the crime stoppers organization no later than 45 calendar days prior to the meeting at which the Council will consider the renewal of certification of the organization. The written notification shall include the following:

(A) Any reasons why the organization may no longer meet ~~[Any noncompliance with]~~ the certification requirements described in §3.9000(b) ~~[§3.9000]~~ of this chapter; and

(B) The date, time, and location of the meeting at which the Council will consider the certification renewal of the organization.

(2) The crime stoppers organization may submit a written response, which shall include an explanation and specific reasons why the organization believes that its certification should be renewed. The written response must be received by the director of the Council at least 10 calendar days prior to the meeting at which the Council will consider the renewed certification ~~[decertification]~~ of the organization.

(3) The Council shall render a decision regarding the certification renewal of the crime stoppers organization and shall notify the organization in writing of its decision.

(d) If a crime stoppers organization's certification expires or is not renewed, the director of the Council shall notify the state comptroller, and the relevant courts, county auditors and community supervision and corrections departments in the organization's region, that the organization is decertified and is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A ~~[Article 42-12]~~ of the Texas Code of Criminal Procedure.

(e) Not later than the 60th day after the date of expiration or non-renewal of the certification of the organization, the organization shall forward all unexpended money received pursuant to §414.010 of the Texas Government Code ~~[under this section]~~ to the state comptroller and shall submit reports as required in §3.9011(b)(5) and §3.9011(d) of this chapter, covering the period since the last submitted reports, and any other information prescribed by the director of the Council or the Council.

*§3.9007. Closing of Business.*

(a) If a crime stoppers organization chooses to no longer operate or to dissolve during its two-year certification period or if the organization chooses to not apply for renewal of its certification, the organization shall send written notification to the Texas Crime Stoppers Council (Council).

(b) The organization may request an effective date of decertification in the notification. The written notification will ~~[effectively]~~ decertify the organization, effective on a date determined by the director of the Council, provided that the effective date is no later than the expiration date of the current certification or the date requested by the organization, whichever is earlier. ~~[The date of the notification will serve as the date of decertification.]~~

(c) The closed or dissolved organization is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A ~~[Article 42.12]~~ of the Texas Code of Criminal Procedure.

(d) Upon receipt of this notification and effective decertification, the director of the Council shall notify the state comptroller, and the relevant courts, county auditors and community supervision and corrections departments in the organization's region, that the organization is decertified and is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A ~~[Article 42.12]~~ of the Texas Code of Criminal Procedure.

(e) Not later than the 60th day after the date of dissolution or decertification of the organization, the ~~dissolved or~~ decertified organization shall forward all unexpended money received pursuant to §414.010 of the Texas Government Code ~~[under this section]~~ to the state comptroller and shall submit reports as required in §3.9011(b)(5) and §3.9011(d) of this chapter, covering the period since the last submitted reports, and any other information prescribed by the director of the Council or the Council.

*§3.9011. Crime Stoppers Program Reporting ~~[Information Update Form]~~.*

(a) A crime stoppers organization that is certified by the ~~[Texas Crime Stoppers] Council [(Council)]~~ must submit to the director of the Council a Crime Stoppers Program Annual Report ~~[Information Update Form]~~ no later than January 31 of each calendar year.

(b) A Crime Stoppers Program Annual Report ~~[Information Update Form]~~ must include the following information:

(1) The name, mailing address, email address, and telephone number of the crime stoppers organization, and the internet address of any website operated by the organization;

(2) The name, mailing address, email address, telephone number, occupation, and board position of each member of the organization's governing board;

(3) The name, mailing address, email address, telephone number, and occupation of the organization's executive director (if applicable); ~~[and]~~

(4) The name, mailing address, email address, and telephone number of each of the organization's law enforcement/civilian coordinators;~~[-]~~

(5) A report on the probation fees and repayments received by the organization including such information and in a manner prescribed by the director of the Council or the Council; and

(6) Any other information prescribed by the director of the Council or the Council.

(c) A crime stoppers organization that is certified by the Council must submit to the director of the Council an information update form prescribed by the director of the Council or the Council within 30 days if the organization has a change in the composition of its executive board or its executive director (if applicable) or law enforcement coordinator.

(d) A crime stoppers organization that is certified by the Council shall submit to the director of the Council, or the Council's designee, a Statistical Report on a form prescribed by the Council no later than January 31 and July 31 of each calendar year.

*§3.9015. Review.*

By accepting certification, a crime stoppers organization agrees to the following conditions of review:

(1) CJD will review the activities of a crime stoppers organization that is certified by the Texas Crime Stoppers Council (Council) as necessary to ensure that the organization's finances and programs further the crime prevention purposes of the organization in compliance with the laws and rules governing crime stoppers organizations.

(2) CJD may perform a desk review or an on-site review at the organization's location. In addition, CJD may request that the organization submit relevant information to CJD to support any review.

(3) After a review, the organization shall be notified in writing of any noncompliance identified by CJD in the form of a preliminary report.

(4) The organization shall respond to the preliminary report within a time frame specified by CJD.

(5) The organization's response shall become part of the final report, which shall be submitted to the organization and the director of the Council.

(6) The director of the Council may place an organization in noncompliance on a corrective action plan that specifies actions to be taken by the organization by a specified time, or the director of the Council may recommend to the Council that the organization be considered for decertification or non-renewal of certification of the organization by the Council.

(7) Any noncompliance, including an organization's failure to provide adequate documentation upon request, may serve as grounds for decertification~~[- expiration]~~ or non-renewal of certification of the organization by the Council.

*§3.9017. Mergers of Certified Organizations.*

If a certified crime stoppers organization agrees with another certified crime stoppers organization to merge and form a multi-county or multi-jurisdictional (e.g. ~~[i.e.]~~, county and city) organization, the merged organization must apply for continuing certification, and the following procedures must be followed:

(1) The certified crime stoppers organizations that want to merge must have contiguous borders.

(2) The merging organizations must choose a name for the merged organization unless both organizations agree to operate under the name of one of the existing organizations.

(3) The merged organization must file the following documents with the director of the Texas Crime Stoppers Council (Council) requesting certification under a new name (if applicable) and with the expanded geographic territory or jurisdiction:

(A) All required Texas Secretary of State, Texas Comptroller, and United States Internal Revenue Service (IRS) required forms and documentation for mergers and dissolutions, as applicable, or as specified by the director of the Council;

(B) IRS compliance documents for dissolution of a 501(c)(3) non-profit corporation and a 501(c)(3) letter authorizing the organization to operate under the new name (if applicable);

(C) Texas Secretary of State compliance documents for 501(c)(3) non-profit corporations, as applicable, or as specified by the director of the Council;

(D) Application for Continuing Certification under the new name (if applicable) and with an expanded geographic territory or jurisdiction;

(E) Statements for all financial accounts for [Copies of financial reviews of the restricted court fees accounts for] all merging organizations as required in §3.9000(f)(1) of this chapter [as required in §414.010(b), Texas Government Code; these financial reviews must be conducted by a Certified Public Accountant];

(F) Copy of board of directors membership list of the merged organization, to include contact information for board members, the law enforcement coordinator, and the executive director (if applicable);

(G) Copies of letters from community supervision and corrections departments (CSCD) detailing the amount of court fees paid to the merging organizations during the previous two years, up to and including the date of the proposed merger, under the provisions of Articles [42-12,] 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure;

(H) Training certificates showing that at least one board member (if applicable), the law enforcement coordinator, and an executive director (if applicable) received training as authorized by the Council within the 12-month period preceding the merger;

(I) Copies of Crime Stoppers Program Annual [Probation Fee and Repayment] Reports for the merging organizations for the previous two calendar years as specified by §414.010(a), Texas Government Code;

(J) Copies of the minutes of the boards of directors meetings of both certified crime stoppers organizations in which the boards voted to merge their organizations; and]

(K) Copy of a cooperative agreement or memorandum of understanding (MOU) between the merged organizations regarding the merger and a copy of each organization's minutes of the board of directors for the meeting where the agreement or MOU is approved; and

(L) Any other information or documents prescribed by the director of the Council or the Council.

(4) If the director of the Council determines that the merged organization meets all requirements within paragraphs (1) - (3) of this section, the merged organization will be presented to the Council for

determination as to whether the merged organization meets the requirements for certification at the Council's next regularly scheduled meeting.

(5) Once the Council grants certification, the merged organization may merge or consolidate the separate rewards accounts of both organizations. The merged organization will also be eligible to apply to the relevant CSCDs to receive court fees under the provisions of Articles [42-12,] 37.073[.] and 42.152 and Chapter 42A, Texas Code of Criminal Procedure.

(6) The merged organization's "Excess Funds Accounts [~~Account~~]," as described [~~defined~~] in §414.010(d) of the Texas Government Code, may only be comprised of those funds that were previously in each individual organization's "Excess Funds Accounts [~~Account~~]." [Three years from the merged organization's certification date, the merged organization may establish an "Excess Funds Account" in accordance with §414.010(d) of the Texas Government Code.]

(7) The certification is valid for a period of two years.

*§3.9019. Mergers of Non-certified Organizations to Certified Organizations.*

If a certified crime stoppers organization agrees with a non-certified crime stoppers organization to merge and form a multi-county or multi-jurisdictional (e.g. [i.e.], county and city) organization, the merged organization must apply for continuing certification, and the following procedures must be followed:

(1) The certified crime stoppers organization that wants to merge with a non-certified 501(c)(3) crime stoppers organization must have contiguous borders.

(2) The merging organizations must choose a name for the merged organization unless both organizations agree to operate under the name of one of the existing organizations.

(3) The merged organization must file the following documents with the director of the Texas Crime Stoppers Council (Council) requesting certification under a new name (if applicable) and with the expanded geographic territory or jurisdiction:

(A) All required Texas Secretary of State, Texas Comptroller, and United States Internal Revenue Service (IRS) required forms and documentation for mergers and dissolutions, as applicable, or as specified by the director of the Council;

(B) IRS compliance documents for dissolution of a 501(c)(3) non-profit corporation and a 501(c)(3) letter authorizing the organization to operate under the new name (if applicable);

(C) Texas Secretary of State compliance documents for 501(c)(3) non-profit corporations, as applicable, or as specified by the director of the Council;

(D) Application for Continuing Certification under the new name (if applicable) and with an expanded geographic territory or jurisdiction;

(E) Statements for all financial accounts [Copies of financial reviews of the restricted court fees accounts] for the certified crime stoppers organization as required in §3.9000(f)(1) of this chapter [as required in §414.010(b), Texas Government Code; these financial reviews must be conducted by a Certified Public Accountant];

(F) Statements for all financial [Copies of financial reviews of all bank] accounts showing beginning and ending balances for each of the prior two calendar years and the current year-to-date

held by the non-certified 501(c)(3) crime stoppers organization; ~~[these financial reviews must be conducted by a Certified Public Accountant;]~~

(G) If the financial review establishes that at any time the non-certified 501(c)(3) crime stoppers organization was certified by the Council and received court fees under Articles ~~[42.12,]~~ 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure, and failed to return all court fees to the state comptroller within 60 days following the loss of certification, as required by §414.010(c), Texas Government Code, a copy of the check for the outstanding court fees, made payable to the Office of the Comptroller, or other satisfactory proof, must be submitted with the application for certification;

(H) Copy of board of directors membership list of the merged organization, to include contact information for board members, the law enforcement coordinator, and executive director (if applicable);

(I) Copies of letters from the community supervision and corrections departments (CSCD) detailing the amount of court fees paid to the certified crime stoppers organization during the previous two years, up to and including the date of the proposed merger, under the provisions of Articles ~~[42.12,]~~ 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure;

(J) Training certificates showing that at least one board member (if applicable), the law enforcement coordinator, and an executive director (if applicable) received training as authorized by the Council within the 12-month period preceding the merger;

(K) Copies of Crime Stoppers Program Annual [Probation Fee and Repayment] Reports for the certified crime stoppers organization for the previous two calendar years as specified by §414.010(a), Texas Government Code;

(L) Copies of the minutes of the boards of directors meetings of the certified crime stoppers organization and the non-certified 501(c)(3) crime stoppers organization in which the boards voted to merge their organizations; ~~[and]~~

(M) Copy of a cooperative agreement or memorandum of understanding (MOU) between the merged organizations regarding the merger and a copy of each organization's minutes of the board of directors for the meeting where the agreement or MOU is approved; and

(N) Any other information or documents prescribed by the director of the Council or the Council.

(4) If the director of the Council determines that the merged organization meets all requirements of this section, the merged organization will be presented to the Council for determination as to whether the merged organization meets the requirements for certification at the Council's next regularly scheduled meeting.

(5) Once the Council grants certification, the merged organization may merge or consolidate the separate rewards accounts of the merged organizations. The merged organization also will be eligible to apply to the relevant CSCDs to receive court fees under the provisions of Articles ~~[42.12,]~~ 37.073~~;~~ and 42.152 and Chapter 42A, Texas Code of Criminal Procedure.

(6) The merged organization's "Excess Funds Accounts [Account]," as described ~~[defined]~~ in §414.010(d) of the Texas Government Code, may only be comprised of those funds that were previously in each individual organization's "Excess Funds Accounts [Account]." ~~[Three years from the merged organization's certification date, the merged organization may establish an "Excess Funds Account" in accordance with §414.010(d) of the Texas Government Code.]~~

(7) The certification is valid for a period of two years.

*§3.9021. Addition of Geographic Territories or Jurisdictions to Certified Organizations.*

(a) If a geographic territory or jurisdiction wants to join an existing certified crime stoppers organization, the organization must apply for continuing certification, and the following procedures must be followed:

(1) The geographic territory or jurisdiction seeking to join the organization ~~[county or city]~~ must share contiguous borders with the certified crime stoppers organization~~;~~

(2) The certified crime stoppers organization and the geographical entity that is requesting to join the crime stoppers organization must choose a new name for the organization unless both parties agree to operate under the name of the existing organization~~;~~

(3) The certified crime stoppers organization must file the following documents with the director of the Texas Crime Stoppers Council (Council) requesting certification under a new name (if applicable) and with an expanded geographic territory or jurisdiction:

(A) United States Internal Revenue Service (IRS) letter for a 501(c)(3) corporation authorizing the organization to operate under a new name, if applicable;

(B) Texas Secretary of State letter for a 501(c)(3) corporation authorizing the organization to operate under a new name (if applicable);

(C) Application for Continuing Certification under the new name (if applicable) and with an expanded geographic territory or jurisdiction;

(D) Statements for all financial accounts ~~[Copies of a financial review of all bank accounts]~~ for the certified crime stoppers organization as required in §3.9000(f)(1) of this chapter;

(E) Copy of board of directors membership list for the organization, to include contact information for board members, the law enforcement coordinator, and executive director (if applicable);

(F) Copies of letters from the community supervision and corrections departments (CSCD) detailing the amount of court fees paid to the certified organization during the previous two years, under the provisions of Articles ~~[42.12,]~~ 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure;

(G) Training certificates showing that at least one board member (if applicable), the law enforcement coordinator, and an executive director (if applicable) received training as authorized by the Council within the 12-month period preceding the new Application for Continuing Certification;

(H) Copies of Crime Stoppers Program Annual [Probation Fee and Repayment] Reports for the certified crime stoppers organization for the previous two calendar years as specified by §414.010(a), Texas Government Code;

(I) Copy of the minutes of the board of directors meeting of the certified crime stoppers organization in which the board voted to add the new geographical entity to the territory or jurisdiction served by the crime stoppers organization; ~~[and]~~

(J) Written documentation from a law enforcement agency serving the ~~[citizens of the]~~ geographic territory or jurisdiction showing an interest in joining an existing crime stoppers organization; and

(K) Any other information or documents prescribed by the director of the Council or the Council.

(4) If the director of the Council determines that the newly expanded organization meets all requirements listed in paragraphs (1) - (3) of this subsection, the expanded organization will be presented to the Council for determination as to whether the expanded organization meets the requirements for certification at the Council's next regularly scheduled meeting. [The Council may grant expanded certification at its discretion.]

(5) Once the Council grants certification, the organization will be eligible to apply to the CSCDs in the newly acquired geographic territory or jurisdiction to receive court fees under the provisions of Articles [42-42,] 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure.

(6) The certification is valid for a period of two years.

(b) If a certified or non-certified organization serves the geographic area to which a certified organization is attempting to expand, the expanding organization must send written notice to the Council and to the organization serving the geographic area to which it intends to expand of its intent to serve that area.

#### §3.9025. Excess Funds.

(a) A certified crime stoppers organization may establish Excess Funds Accounts in accordance with §414.010(d) of the Texas Government Code. At the conclusion of each fiscal year, if the total amount of funds in the organization's rewards accounts exceeds three times the average annual amount of funds used by the organization to pay rewards during each of the three preceding fiscal years, the organization may deposit such excess amount into its Excess Funds Accounts.

(b) The Excess Funds Accounts may only be used for expenditures for law enforcement or public safety purposes directly related to crime stoppers or juvenile justice, which means:

(1) Costs incurred in providing training to crime stoppers volunteers or law enforcement coordinators and travel costs necessary to complete that training;

(2) Costs associated with supporting volunteers in performing crime stoppers operations;

(3) Juvenile delinquency prevention or intervention programs;

(4) Promotional or marketing costs encouraging utilization of crime stoppers tip lines or recruiting volunteers for crime stoppers organizations; and

(5) Transfers to the crime stoppers assistance account in the general revenue fund or to other certified crime stoppers organizations, provided that the transferring certified crime stoppers organization ensures the receiving certified crime stoppers organization uses such funds for law enforcement or public safety purposes as described in this subsection.

(c) Pursuant to §414.010(d) of the Texas Government Code, a certified crime stoppers organization that deposits funds in an Excess Funds Account may use any interest earned on the funds in such account to pay costs incurred in administering the organization.

(d) Among other uses, a certified crime stoppers organization is not considered to be using its excess funds for a law enforcement or public safety purpose related to crime stoppers or juvenile justice if:

(1) It uses such excess funds to pay the salary or compensation of any public employee;

(2) It uses such excess funds for law enforcement equipment not directly related to crime stoppers or juvenile delinquency prevention or intervention purposes;

(3) It pays or reimburses for travel or per diem costs that exceed those allowed for state officials or employees with its excess funds;

(4) It unnecessarily retains such excess funds for an extended period of time; or

(5) It uses such excess funds for a purpose or in a manner prohibited by federal or state law.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 17, 2019.

TRD-201904871

Margie Fernandez-Prew

Director, Texas Crime Stoppers Council

Office of the Governor

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 463-1919



### **1 TAC §3.9010, §3.9013**

The Texas Crime Stoppers Council (Council) proposes the repeal of 1 TAC §3.9010 and §3.9013, concerning reports required to be submitted by crime stoppers organizations (organizations).

#### **EXPLANATION OF PROPOSED REPEALS**

The Council's current rules at §3.9010 and §3.9013 require organizations to submit certain annual and quarterly reports. The Council proposes to repeal these rules because it is proposing in a separate notice to consolidate the reporting requirements for organizations, and will request the relevant information from the reports currently required under §3.9010 and §3.9013, in a single amended rule at §3.9011.

#### **FISCAL NOTE**

Margie Fernandez-Prew, Director of the Texas Crime Stoppers Council, has determined that for each year of the first five years in which the proposed repeals are in effect, there are no expected fiscal implications for the state or local governments as a result of the proposed repeals. Ms. Fernandez-Prew has further determined that the proposed repeals have no anticipated effect on local employment or local economies.

#### **PUBLIC BENEFIT AND COSTS**

Ms. Fernandez-Prew has also determined that for each year of the first five years in which the proposed repeals are in effect, the public benefit anticipated as a result of the proposed repeals will be to streamline and increase the efficiency in organizations' reporting. There are no anticipated economic costs to persons that are required to comply with the Council's rules as a result of the proposed repeals. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities; therefore, preparation of an economic impact statement and a regulatory flexibility analysis is not required.

#### **GOVERNMENT GROWTH IMPACT STATEMENT**

Finally, Ms. Fernandez-Prew has determined that for each year of the first five years in which the proposed repeals are in effect, the proposed repeals will have the following effect on government growth. The proposed repeals will not create or eliminate



any government programs or employee positions. Additionally, the proposed repeals will not require an increase or decrease in future legislative appropriations to the Council or change any fees paid to the Council. The proposed repeals will not create a new regulation nor will they expand or limit any existing regulation, but they will repeal two existing regulations. Furthermore, the proposed repeals will not increase or decrease the number of individuals subject to the applicability of the Council's rules. The proposed repeals are not anticipated to affect this state's economy.

#### SUBMITTAL OF COMMENTS

Written comments regarding the proposed repeals may be submitted to Margie Fernandez-Prew, Office of the Governor, Texas Crime Stoppers Council, P.O. Box 12428, Austin, Texas 78711 or to [txcrimestoppers@gov.texas.gov](mailto:txcrimestoppers@gov.texas.gov) with the subject line "Repeal of Council Rules." The deadline for receipt of comments is 5:00 p.m. CST on February 3, 2020. All requests for a public hearing on the proposed repeals, submitted under the Administrative Procedure Act, must be received by the Council no more than fifteen (15) days after the notice of proposed repeals in the sections have been published in the *Texas Register*.

#### STATUTORY AUTHORITY

The repeals are proposed under Government Code, §414.006, which provides that the Council may adopt rules to carry out its functions under that chapter.

Cross Reference to Statute: Chapter 414, Government Code.

§3.9010. *Annual Probation Fee and Repayment Report.*

§3.9013. *Quarterly Statistical Reports.*

Filed with the Office of the Secretary of State on December 17, 2019.

TRD-201904872

Margie Fernandez-Prew

Director, Texas Crime Stoppers Council

Office of the Governor

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 463-1919



## PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

### CHAPTER 355. REIMBURSEMENT RATES

#### SUBCHAPTER J. PURCHASED HEALTH SERVICES

#### DIVISION 11. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM REIMBURSEMENT

##### 1 TAC §355.8201

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.8201, concerning Waiver Payments to Hospitals for Uncompensated Care.

#### BACKGROUND AND PURPOSE

The Health and Human Services Commission received federal approval to create the Uncompensated Care (UC) pool via a waiver from section 1115 of the Social Security Act. The UC pool's role in Medicaid financing, as described in this section, is to provide supplemental payments to hospitals for the cost of uncompensated care resulting from the Medicaid shortfall and providing care to persons without insurance. As part of the UC application process, historic utilization and cost data are used to estimate the amount of the UC funds for which a hospital may be eligible. A reconciliation of actual utilization and cost data with the estimated data occurs two years after receipt of a UC payment. This process ensures a hospital did not receive more funding than allowed per its hospital specific limit.

The UC application process allowed hospitals the option to request that cost and payment data from the data year be adjusted to reflect increases or decreases in costs resulting from changes in operation or circumstances. If a hospital requested an adjustment, it would be subject to a secondary reconciliation process.

The purpose of the proposal is to eliminate the requirement that a secondary reconciliation be performed for a hospital that submitted a request for an adjustment to cost and payment data for their UC application for demonstration year (DY) 2 (October 1, 2012, to September 30, 2013). The UC applicants did not have the benefit of fully knowing the consequences of requesting an adjustment before they submitted their UC applications. The adjustments were requested prior to the effective date of the rule amendment that required a secondary reconciliation process to occur if cost and payment data adjustments were requested.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment of §355.8201(i)(3) eliminates the secondary reconciliation process for hospitals that requested an adjustment to their UC application for DY 2 (October 1, 2012, to September 30, 2013).

#### FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state or local governments.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule will be in effect:

- (1) the proposed rule will not create or eliminate a government program;
- (2) implementation of the proposed rule will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;
- (4) the proposed rule will not affect fees paid to HHSC;
- (5) the proposed rule will not create a new rule;
- (6) the proposed rule will limit existing rule;
- (7) the proposed rule will not change the number of individuals subject to the rule; and
- (8) the proposed rule will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules. Hospitals that participated in the UC program in DY 2 and requested adjustments to cost and payment data would be exempt from a secondary reconciliation process.

#### LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

#### COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons.

#### PUBLIC BENEFIT AND COSTS

Charles Greenberg, Director of Hospital Finance and Waiver Programs, has determined that for each year of the first five years the rule is in effect, the public benefit is that certain hospitals will not be subject to a recoupment based on a secondary reconciliation process; thereby, allowing hospitals to retain more of its funding from DY 2 (October 1, 2012, to September 30, 2013).

Trey Wood has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule. The proposed rule would no longer require a secondary reconciliation of actual hospital costs with uncompensated-care payments for hospital adjustments submitted to HHSC during DY 2.

#### TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to [HHSRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 19R070" in the subject line.

#### STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable

rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

The amendment affects Human Resources Code Chapter 32 and Government Code Chapter 531.

#### §355.8201. *Waiver Payments to Hospitals for Uncompensated Care.*

(a) Introduction. Texas Healthcare Transformation and Quality Improvement Program §1115(a) Medicaid demonstration waiver payments are available under this section for services provided between October 1, 2017 and September 30, 2019, by eligible hospitals described in subsection (c) of this section. Waiver payments to hospitals for uncompensated charity care provided beginning October 1, 2019, are described in §355.8212 of this division (relating to Waiver Payments to Hospitals for Uncompensated Charity Care). Waiver payments to hospitals must be in compliance with the Centers for Medicare & Medicaid Services approved waiver Program Funding and Mechanics Protocol, HHSC waiver instructions and this section.

##### (b) Definitions.

(1) Affiliation agreement--An agreement, entered into between one or more privately-operated hospitals and a governmental entity that does not conflict with federal or state law. HHSC does not prescribe the form of the agreement.

(2) Aggregate limit--The amount of funds approved by the Centers for Medicare & Medicaid Services for uncompensated-care payments for the demonstration year that is allocated to each uncompensated-care provider pool, as described in subsection (f)(2) of this section.

(3) Anchor--The governmental entity identified by HHSC as having primary administrative responsibilities on behalf of a Regional Healthcare Partnership (RHP).

(4) Centers for Medicare & Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(5) Clinic--An outpatient health care facility, other than an Ambulatory Surgical Center or Hospital Ambulatory Surgical Center, that is owned and operated by a hospital but has a nine-digit Texas Provider Identifier (TPI) that is different from the hospital's nine-digit TPI.

(6) Data year--A 12-month period that is described in §355.8066 of this title (relating to Hospital-Specific Limit Methodology) and from which HHSC will compile cost and payment data to determine uncompensated-care payment amounts. This period corresponds to the Disproportionate Share Hospital data year.

(7) Delivery System Reform Incentive Payments (DSRIP)--Payments related to the development or implementation of a program of activity that supports a hospital's efforts to enhance access to health care, the quality of care, and the health of patients and families it serves. These payments are not considered patient-care revenue and are not offset against the hospital's costs when calculating the hospital-specific limit as described in §355.8066 of this title.

(8) Demonstration year--The 12-month period beginning October 1 for which the payments calculated under this section are made. This period corresponds to the Disproportionate Share Hospital program year.

(9) Disproportionate Share Hospital (DSH)--A hospital participating in the Texas Medicaid program that serves a dispropor-

tionate share of low-income patients and is eligible for additional reimbursement from the DSH fund.

(10) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(11) HHSC--The Texas Health and Human Services Commission or its designee.

(12) Institution for mental diseases (IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness.

(13) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(14) Large public hospital--An urban public hospital - Class one as defined in §355.8065 of this title (relating to Disproportionate Share Hospital Reimbursement Methodology).

(15) Mid-Level Professional--Medical practitioners which include only these professions: Certified Registered Nurse Anesthetists, Nurse Practitioners, Physician Assistants, Dentists, Certified Nurse Midwives, Clinical Social Workers, Clinical Psychologists, and Optometrists.

(16) Private hospital--A hospital that is not a large public hospital as defined in paragraph (14) of this subsection, a small public hospital as defined in paragraph (21) of this subsection or a state-owned hospital.

(17) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(18) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(19) RHP plan--A multi-year plan within which participants propose their portion of waiver funding and DSRIP projects.

(20) Rural hospital--A hospital enrolled as a Medicaid provider that is:

(A) located in a county with 60,000 or fewer persons according to the 2010 U.S. Census; or

(B) designated by Medicare as a Critical Access Hospital (CAH) or a Sole Community Hospital (SCH); or

(C) designated by Medicare as a Rural Referral Center (RRC) and is not located in a Metropolitan Statistical Area (MSA), as defined by the U.S. Office of Management and Budget, or is located in an MSA but has 100 or fewer beds.

(21) Small public hospital--An urban public hospital - Class two or a non-urban public hospital as defined in §355.8065 of this title.

(22) Transition payment--Payments available only during the first demonstration year to hospitals that previously participated in a supplemental payment program under the Texas Medicaid State Plan. For a hospital participating in the 2012 DSH program, the maximum amount a hospital may receive in transition payments is the lesser of:

(A) the hospital's 2012 DSH room; or

(B) the amount the hospital received in supplemental payments for claims adjudicated between October 1, 2010, and September 30, 2011.

(23) Uncompensated-care application--A form prescribed by HHSC to identify uncompensated costs for Medicaid-enrolled providers.

(24) Uncompensated-care payments--Payments intended to defray the uncompensated costs of services that meet the definition of "medical assistance" contained in §1905(a) of the Social Security Act that are provided by the hospital to Medicaid eligible or uninsured individuals.

(25) Uninsured patient--An individual who has no health insurance or other source of third-party coverage for services, as defined by CMS.

(26) Urban rural referral center--A hospital designated by Medicare as a Rural Referral Center (RRC) that is located in a Metropolitan Statistical Area (MSA), as defined by the U.S. Office of Management and Budget, and that has more than 100 beds.

(27) Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under §1115 of the Social Security Act.

(c) Eligibility. A hospital that meets the requirements described in this subsection may receive payments under this section.

(1) Generally. To be eligible for any payment under this section:

(A) a hospital must have a source of public funding for the non-federal share of waiver payments; and

(B) if it is a hospital not operated by a governmental entity, it must have filed with HHSC an affiliation agreement and the documents described in clauses (i) and (ii) of this subparagraph.

(i) The hospital must certify on a form prescribed by HHSC:

(I) that it is a privately-operated hospital;

(II) that no part of any payment to the hospital under this section will be returned or reimbursed to a governmental entity with which the hospital affiliates; and

(III) that no part of any payment under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the hospital's receipt of the supplemental funds.

(ii) The governmental entity that is party to the affiliation agreement must certify on a form prescribed by HHSC:

(I) that the governmental entity has not received and has no agreement to receive any portion of the payments made to any hospital that is party to the agreement;

(II) that the governmental entity has not entered into a contingent fee arrangement related to the governmental entity's participation in the waiver program;

(III) that the governmental entity adopted the conditions described in the certification form prescribed by or otherwise approved by HHSC pursuant to a vote of the governmental entity's governing body in a public meeting preceded by public notice published in accordance with the governmental entity's usual and customary practices or the Texas Open Meetings Act, as applicable; and

(IV) that all affiliation agreements, consulting agreements, or legal services agreements executed by the governmental entity related to its participation in this waiver payment program are available for public inspection upon request.

(iii) Submission requirements.

(I) Initial submissions. The parties must initially submit the affiliation agreements and certifications described in this subsection to the HHSC Rate Analysis Department on the earlier of the following occurrences after the documents are executed:

(-a-) The date the hospital submits the uncompensated-care application that is further described in paragraph (2) of this subsection; or

(-b-) Thirty days before the projected deadline for completing the IGT for the first payment under the affiliation agreement. The projected deadline for completing the IGT is posted on HHSC Rate Analysis' website for each payment under this section.

(II) Subsequent submissions. The parties must submit revised documentation as follows:

(-a-) When the nature of the affiliation changes or parties to the agreement are added or removed, the parties must submit the revised affiliation agreement and related hospital and governmental entity certifications.

(-b-) When there are changes in ownership, operation, or provider identifiers, the hospital must submit a revised hospital certification.

(-c-) The parties must submit the revised documentation thirty days before the projected deadline for completing the IGT for the first payment under the revised affiliation agreement. The projected deadline for completing the IGT is posted on HHSC Rate Analysis' website for each payment under this section.

(III) A hospital that submits new or revised documentation under subclause (I) or (II) of this clause must notify the Anchor of the RHP in which the hospital participates.

(IV) The certification forms must not be modified except for those changes approved by HHSC prior to submission.

(-a-) Within 10 business days of HHSC Rate Analysis receiving a request for approval of proposed modifications, HHSC will approve, reject, or suggest changes to the proposed certification forms.

(-b-) A request for HHSC approval of proposed modifications to the certification forms will not delay the submission deadlines established in this clause.

(V) A hospital that fails to submit the required documentation in compliance with this subparagraph will not receive a payment under this section.

(2) Uncompensated-care payments. For a hospital to be eligible to receive uncompensated-care payments, in addition to the requirements in paragraph (1) of this subsection, the hospital must:

(A) submit to HHSC an uncompensated-care application for the demonstration year, as is more fully described in subsection (g)(1) of this section, by the deadline specified by HHSC;

(B) submit to HHSC documentation of:

(i) its participation in an RHP; or

(ii) approval from CMS of its eligibility for uncompensated-care payments without participation in an RHP;

(C) be actively enrolled as a Medicaid provider in the State of Texas at the beginning of the demonstration year; and

(D) have submitted, and be eligible to receive payment for, a Medicaid fee-for-service or managed-care inpatient or outpatient claim for payment during the demonstration year.

(3) Changes that may affect eligibility for uncompensated-care payments.

(A) If a hospital closes, loses its license, loses its Medicaid or Medicaid eligibility, withdraws from participation in an RHP, or files bankruptcy before receiving all or a portion of the uncompensated-care payments for a demonstration year, HHSC will determine the hospital's eligibility to receive payments going forward on a case-by-case basis. In making the determination, HHSC will consider multiple factors including whether the hospital was in compliance with all requirements during the demonstration year and whether it can satisfy the requirement to cooperate in the reconciliation process as described in subsection (i) of this section.

(B) A hospital must notify HHSC Rate Analysis Department in writing within 30 days of the filing of bankruptcy or of changes in ownership, operation, licensure, Medicare or Medicaid enrollment, or affiliation that may affect the hospital's continued eligibility for payments under this section.

(d) Source of funding. The non-federal share of funding for payments under this section is limited to timely receipt by HHSC of public funds from a governmental entity.

(e) Payment frequency. HHSC will distribute waiver payments on a schedule to be determined by HHSC and posted on HHSC's website.

(f) Funding limitations.

(1) Payments made under this section are limited by the maximum aggregate amount of funds allocated to the provider's uncompensated-care pool for the demonstration year. If payments for uncompensated care for an uncompensated-care pool attributable to a demonstration year are expected to exceed the aggregate amount of funds allocated to that pool by HHSC for that demonstration year, HHSC will reduce payments to providers in the pool as described in subsection (g)(5) of this section.

(2) HHSC will establish the following seven uncompensated-care pools: a state-owned hospital pool; a large public hospital pool; a small public hospital pool; a private hospital pool; a physician group practice pool; a governmental ambulance provider pool; and a publicly owned dental provider pool as follows:

(A) The state-owned hospital pool.

(i) The state-owned hospital pool funds uncompensated-care payments to state-owned teaching hospitals, state-owned IMDs and state chest hospitals.

(ii) HHSC will determine the allocation for this pool at an amount less than or equal to the total annual maximum uncompensated-care payment amount for these hospitals as calculated in subsection (g)(2) of this section.

(B) Set-aside amounts. HHSC will determine set-aside amounts as follows:

(i) For small public hospitals:

(I) that are also rural hospitals:

(-a-) Divide the amount of funds approved by CMS for uncompensated-care payments for the demonstration year by the amount of funds approved by CMS for uncompensated-care payments for the 2013 demonstration year and round the result to four decimal places.

(-b-) Determine the small rural public hospital set-aside amount by multiplying the value from item (-a-) of this subclause by the sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all small rural public hospitals that are eligible to receive uncompensated-care payments under this section and that meet the definition of a small public hospital from subsection (b)(21) of this section. Truncate the resulting value to zero decimal places.

(II) that are also urban RRCs, for DY 7 only, determine the small public urban RRC set-aside amount by multiplying by 54% the sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all small public urban RRCs that are eligible to receive uncompensated-care payments under this section and that meet the definition of an urban RRC from subsection (b)(26) of this section. Truncate the resulting value to zero decimal places.

(ii) For private hospitals:

(I) that are also rural hospitals:

(-a-) Divide the amount of funds approved by CMS for uncompensated-care payments for the demonstration year by the amount of funds approved by CMS for uncompensated-care payments for the 2013 demonstration year and round the result to four decimal places.

(-b-) Determine the private rural hospital set-aside amount by multiplying the value from item (-a-) of this subclause by the sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all private rural hospitals that are eligible to receive uncompensated-care payments under this section and that meet the definition of a small public hospital from subsection (b)(21) of this section. Truncate the resulting value to zero decimal places.

(II) that are also urban RRCs, for DY 7 only, determine the private urban RRC set-aside amount by multiplying by 54% the sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all private urban RRCs that are eligible to receive uncompensated-care payments under this section and that meet the definition of an urban RRC from subsection (b)(26) of this section. Truncate the resulting value to zero decimal places.

(iii) Determine the total set-aside amount by summing the results of subclauses (i)(I), (i)(II), (ii)(I), and (ii)(II) of this subparagraph.

(C) Non-state-owned provider pools. HHSC will allocate the remaining available uncompensated-care funds, if any, and the set-aside amount among the non-state-owned provider pools as described in this subparagraph. The remaining available uncompensated-care funds equal the amount of funds approved by CMS for uncompensated-care payments for the demonstration year less the sum of funds allocated to the state-owned hospital pool under subparagraph (A) of this paragraph and the set-aside amount from subparagraph (B) of this paragraph.

(i) HHSC will allocate the funds among non-state-owned provider pools based on the following amounts:

(I) Large public hospitals:

(-a-) The sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all large public hospitals, as defined in subsection (b)(14) of this section, eligible to receive uncompensated-care payments under this section; plus

(-b-) An amount equal to the IGTs transferred to HHSC by large public hospitals to support DSH payments to themselves and private hospitals for the same demonstration year.

(II) Small public hospitals:

(-a-) The sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all non-rural and non-urban RRC small public hospitals, as defined in subsection (b)(21) of this section, eligible to receive uncompensated-care payments under this section; plus

(-b-) An amount equal to the IGTs transferred to HHSC by small public hospitals to support DSH payments to themselves for Pass One and Pass Two payments for the same demonstration year.

(III) Private hospitals: The sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all non-rural and non-urban RRC private hospitals, as defined in subsection (b)(16) of this section, eligible to receive uncompensated-care payments under this section.

(IV) Physician group practices: The sum of the unreimbursed uninsured costs and Medicaid shortfall for physician group practices, as described in §355.8202(g)(2)(A) of this title (relating to Waiver Payments to Physician Group Practices for Uncompensated Care).

(V) Governmental ambulance providers: The sum of the uncompensated care costs multiplied by the federal medical assistance percentage (FMAP) in effect during the cost reporting period for governmental ambulance providers, as described in §355.8600 of this title (relating to Reimbursement Methodology for Ambulance Services). Estimated amounts may be used if actual data is not available at the time calculations are performed.

(VI) Publicly-owned dental providers: The sum of the total allowable cost minus any payments for publicly owned dental providers, as described in §355.8441 of this title (relating to Reimbursement Methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services). Estimated amounts may be used if actual data is not available at the time calculations are performed.

(ii) HHSC will sum the amounts calculated in clause (i) of this subparagraph.

(iii) HHSC will calculate the aggregate limit for each non-state-owned provider pool as follows:

(I) To determine the large public hospital pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds, from this subparagraph, by the amount calculated in clause (i)(I) of this subparagraph; and

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places.

(II) To determine the small public hospital pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(II) of this subparagraph;

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places; and

(-c-) add the result from item (-b-) of this subclause to the amount calculated in subparagraph (B)(ii) of this paragraph.

(III) To determine the private hospital pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(III) of this subparagraph;

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places; and

(-c-) add the result from item (-b-) of this subclause to the amount calculated in subparagraph (B)(iii) of this paragraph.

(IV) To determine the physician group practice pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(IV) of this subparagraph; and

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places.

(V) To determine the maximum aggregate amount of the estimated uncompensated care costs for all governmental ambulance providers:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(V) of this subparagraph; and

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places.

(VI) To determine the publicly owned dental providers pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(VI) of this subparagraph; and

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places.

(3) Payments made under this section are limited by the availability of funds identified in subsection (d) of this section. If sufficient funds are not available for all payments for which a hospital is eligible, HHSC will reduce payments as described in subsection (h)(2) of this section.

(g) Uncompensated-care payment amount.

(1) Application.

(A) Cost and payment data reported by the hospital in the uncompensated-care application is used to calculate the annual maximum uncompensated-care payment amount for the applicable demonstration year, as described in paragraph (2) of this subsection.

(B) Unless otherwise instructed in the application, the hospital must base the cost and payment data reported in the application on its applicable as-filed CMS 2552 Cost Report(s) For Electronic Filing Of Hospitals corresponding to the data year and must comply with the application instructions or other guidance issued by HHSC.

(i) When the application requests data or information outside of the as-filed cost report(s), the hospital must provide all requested documentation to support the reported data or information.

(ii) For a new hospital, the cost and payment data period may differ from the data year, resulting in the eligible uncompensated costs based only on services provided after the hospital's Medicaid enrollment date. HHSC will determine the data period in such situations.

(2) Calculation. A hospital's annual maximum uncompensated-care payment amount is the sum of the components below. In no case can the sum of payments made to a hospital for a demonstration year for DSH and uncompensated-care payments, less the payments

described in paragraph (3) of this subsection, exceed a hospital's specific limit as determined in §355.8066 of this title after modifications to reflect the adjustments described in paragraph (4) of this subsection.

(A) The interim hospital specific limit, calculated as described in §355.8066 of this title, except that an IMD may not report cost and payment data in the uncompensated-care application for services provided during the data year to Medicaid-eligible and uninsured patients ages 21 through 64, less any payments to be made under the DSH program for the same demonstration year, calculated as described in §355.8065 of this title;

(B) Other eligible costs for the data year, as described in paragraph (3) of this subsection;

(C) Cost and payment adjustments, if any, as described in paragraph (4) of this subsection; and

(D) For each hospital eligible for payments under subsection (f)(2)(C)(i)(I) of this section, the amount transferred to HHSC by that hospital's affiliated governmental entity to support DSH payments for the same demonstration year.

(3) Other eligible costs.

(A) In addition to cost and payment data that is used to calculate the hospital-specific limit, as described in §355.8066 of this title, a hospital may also claim reimbursement under this section for uncompensated care, as specified in the uncompensated-care application, that is related to the following services provided to Medicaid-eligible and uninsured patients:

(i) direct patient-care services of physicians and mid-level professionals;

(ii) pharmacy services; and

(iii) clinics.

(B) The payment under this section for the costs described in subparagraph (A) of this paragraph are not considered inpatient or outpatient Medicaid payments for the purpose of the DSH audit described in §355.8065 of this title.

(4) Adjustments. When submitting the uncompensated-care application, hospitals may request that cost and payment data from the data year be adjusted to reflect increases or decreases in costs resulting from changes in operations or circumstances.

(A) A hospital:

(i) may request that costs not reflected on the as-filed cost report, but which would be incurred for the demonstration year, be included when calculating payment amounts;

(ii) may request that costs reflected on the as-filed cost report, but which would not be incurred for the demonstration year, be excluded when calculating payment amounts.

(B) Documentation supporting the request must accompany the application. HHSC will deny a request if it cannot verify that costs not reflected on the as-filed cost report will be incurred for the demonstration year.

(C) In addition to being subject to the reconciliation described in subsection (i)(1) of this section which applies to all uncompensated-care payments for all hospitals, uncompensated-care payments for hospitals that submitted a request as described in subparagraph (A)(i) of this paragraph that impacted the interim hospital-specific limit described in paragraph (2)(A) of this subsection will be subject to the reconciliation described in subsection (i)(2) of this section.

(D) Notwithstanding the availability of adjustments impacting the interim hospital-specific limit described in this paragraph, no adjustments to the interim hospital-specific limit will be considered for purposes of Medicaid DSH payment calculations described in §355.8065 of this title.

(5) Reduction to stay within uncompensated-care pool aggregate limits. Prior to processing uncompensated-care payments for any payment period within a waiver demonstration year for any uncompensated-care pool described in subsection (f)(2) of this section, HHSC will determine if such a payment would cause total uncompensated-care payments for the demonstration year for the pool to exceed the aggregate limit for the pool and will reduce the maximum uncompensated-care payment amounts providers in the pool are eligible to receive for that period as required to remain within the pool aggregate limit.

(A) Calculations in this paragraph will be applied to each of the uncompensated-care pools separately.

(B) HHSC will calculate the following data points:

(i) For each provider, prior period payments to equal prior period uncompensated-care payments for the demonstration year.

(ii) For each provider, a maximum uncompensated-care payment for the payment period to equal the sum of:

(I) the portion of the annual maximum uncompensated-care payment amount calculated for that provider (as described in this section and the sections referenced in subsection (f)(2)(C) of this section) that is attributable to the payment period; and

(II) the difference, if any, between the portions of the annual maximum uncompensated-care payment amounts attributable to prior periods and the prior period payments calculated in clause (i) of this subparagraph.

(iii) The cumulative maximum payment amount to equal the sum of prior period payments from clause (i) of this subparagraph and the maximum uncompensated-care payment for the payment period from clause (ii) of this subparagraph for all members of the pool combined.

(iv) A pool-wide total maximum uncompensated-care payment for the demonstration year to equal the sum of all pool members' annual maximum uncompensated-care payment amounts for the demonstration year from paragraph (2) of this subsection.

(v) A pool-wide ratio calculated as the pool aggregate limit from subsection (f)(2) of this section divided by the pool-wide total maximum uncompensated-care payment amount for the demonstration year from clause (iv) of this subparagraph.

(C) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is less than the aggregate limit for the pool, each provider in the pool is eligible to receive their maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph without any reduction to remain within the pool aggregate limit.

(D) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is more than the aggregate limit for the pool, HHSC will calculate a revised maximum uncompensated-care payment for the payment period for each provider in the pool as follows:

(i) HHSC will calculate a capped payment amount equal to the product of the provider's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2)

of this subsection and the pool-wide ratio calculated in subparagraph (B)(v) of this paragraph.

(ii) If the payment period is not the final payment period for the demonstration year, the revised maximum uncompensated-care payment for the payment period equals the lesser of:

(I) the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph; or

(II) the difference between the capped payment amount from clause (i) of this subparagraph and the prior period payments from subparagraph (B)(i) of this paragraph.

(iii) If the payment period is the final payment period for the demonstration year:

(I) HHSC will calculate an IGT-supported maximum uncompensated-care payment for the payment period equal to the amount of the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph that is supported by an IGT commitment.

(-a-) For hospitals and physician group practices, HHSC will obtain from each RHP anchor a current breakdown of IGT commitments from all governmental entities, including governmental entities outside of the RHP, that will be providing IGTs for uncompensated-care payments for each hospital and physician group practice within the RHP that is eligible for such payments for the payment period.

(-b-) Ambulance and dental providers will be assumed to have commitments for 100 percent of the non-federal share of their payments. The non-federal share for ambulance providers is provided through certified public expenditures (CPEs); for ambulance providers, references to IGTs in this subsection should be read as references to CPEs.

(II) HHSC will calculate an IGT-supported maximum uncompensated-care payment for the demonstration year to equal the IGT-supported maximum uncompensated-care payment for the payment period from subclause (I) of this clause plus the provider's prior period payments from subparagraph (B)(i) of this paragraph.

(III) For providers with an IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause that is less than or equal to their capped payment amount from clause (i) of this subparagraph, the provider's revised maximum uncompensated-care payment for the payment period equals the IGT-supported maximum uncompensated-care payment amount for the payment period from subclause (I) of this clause. For these providers, the difference between their capped payment amount from clause (i) of this subparagraph and their IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause is their unfunded cap room.

(IV) HHSC will sum all unfunded cap room from subclause (III) of this clause to determine the total unfunded cap room for the pool.

(V) For providers with an IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause that is greater than their capped payment amount from clause (i) of this subparagraph, the provider's revised maximum uncompensated-care payment amount for the payment period is calculated as follows:

(-a-) For each provider, HHSC will calculate an overage amount to equal the difference between the IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause and their capped payment

amount for the demonstration year from clause (i) of this subparagraph. Unfunded cap room from subclause (IV) of this clause will be distributed to these providers based on each provider's overage as a percentage of the pool-wide overage.

(-b-) For each provider, the provider's revised maximum uncompensated-care payment amount for the payment period is equal to the sum of its capped payment amount from clause (i) of this subparagraph and its portion of its pool's unfunded cap room from item (-a-) of this subclause less its prior period payments from subparagraph (B)(i) of this paragraph.

(E) Once reductions to ensure that uncompensated-care expenditures do not exceed the aggregate limit for the demonstration year for the pool are calculated, HHSC will not re-calculate the resulting payments for any provider for the demonstration year, including if the IGT commitments upon which the reduction calculations were based are different than actual IGT amounts.

(F) Notwithstanding the calculations described in subparagraphs (A) - (E) of this paragraph, if the payment period is the final payment period for the demonstration year, to the extent the payment is supported by IGT, each rural hospital is guaranteed a payment at least equal to its interim hospital specific limit from paragraph (2)(A) of this subsection multiplied by the value from subsection (f)(2)(B)(i)(I) of this section for the demonstration year less any prior period payments. If this guarantee will cause payments for a pool to exceed the aggregate pool limit, the reduction required to stay within the pool limit will be distributed proportionally across all non-rural and non-urban RRC providers in the pool based on each provider's resulting payment from subparagraphs (A) - (E) of this paragraph as compared to the payments to all non-rural and non-urban RRC hospitals in the pool resulting from subparagraphs (A) - (E) of this paragraph.

(G) Notwithstanding the calculations described in subparagraphs (A) - (E) of this paragraph, if the payment period is the final payment period for the demonstration year, to the extent the payment is supported by IGT, each urban RRC is guaranteed a payment at least equal to its interim hospital specific limit from paragraph (2)(A) of this subsection multiplied by 54% for the demonstration year less any prior period payments. If this guarantee will cause payments for a pool to exceed the aggregate pool limit, the reduction required to stay within the pool limit will be distributed proportionally across all non-rural and non-urban RRC providers in the pool based on each provider's resulting payment from subparagraphs (A) - (E) of this paragraph as compared to the payments to all non-rural and non-urban RRC hospitals in the pool resulting from subparagraphs (A) - (E) of this paragraph.

(6) Prohibition on duplication of costs. Eligible uncompensated-care costs cannot be reported on multiple uncompensated-care applications, including uncompensated-care applications for other programs. Reporting on multiple uncompensated-care applications is duplication of costs.

(7) Advance payments.

(A) In a demonstration year in which uncompensated-care payments will be delayed pending data submission or for other reasons, HHSC may make advance payments to hospitals that meet the eligibility requirements described in subsection (c)(2) of this section and submitted an acceptable uncompensated-care application for the preceding demonstration year from which HHSC calculated an annual maximum uncompensated-care payment amount for that year.

(B) The amount of the advance payments will be a percentage, to be determined by HHSC, of the annual maximum uncompensated-care payment amount calculated by HHSC for the preceding demonstration year.

(C) Advance payments are considered to be prior period payments as described in paragraph (5)(B)(i) of this subsection.

(D) A hospital that did not submit an acceptable uncompensated-care application for the preceding demonstration year is not eligible for an advance payment.

(E) If a partial year uncompensated-care application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

(h) Payment methodology.

(1) Notice. Prior to making any payment described in subsection (g) of this section, HHSC will give notice of the following information:

(A) the payment amount for the payment period (based on whether the payment is made quarterly, semi-annually, or annually);

(B) the maximum IGT amount necessary for a hospital to receive the amount described in subparagraph (A) of this paragraph; and

(C) the deadline for completing the IGT.

(2) Payment amount. The amount of the payment to a hospital will be determined based on the amount of funds transferred by the affiliated governmental entity or entities as follows:

(A) If the governmental entity transfers the maximum amount referenced in paragraph (1) of this subsection, the hospital will receive the full payment amount calculated for that payment period.

(B) If a governmental entity does not transfer the maximum amount referenced in paragraph (1) of this subsection, HHSC will determine the payment amount to each hospital owned by or affiliated with that governmental entity as follows:

(i) At the time the transfer is made, the governmental entity notifies HHSC, on a form prescribed by HHSC, of the share of the IGT to be allocated to each hospital owned by or affiliated with that entity and provides the non-federal share of uncompensated-care payments for each entity with which it affiliates in a separate IGT transaction; or

(ii) In the absence of the notification described in clause (i) of this subparagraph, each hospital owned by or affiliated with the governmental entity will receive a portion of its payment amount for that period, based on the hospital's percentage of the total payment amounts for all hospitals owned by or affiliated with that governmental entity.

(C) For a hospital that is affiliated with multiple governmental entities, in the event those governmental entities transfer more than the maximum IGT amount that can be provided for that hospital, HHSC will calculate the amount of IGT funds necessary to fund the hospital to its payment limit and refund the remaining amount to the governmental entities identified by HHSC.

(3) Final payment opportunity. Within payments described in this section, a governmental entity that does not transfer the maximum IGT amount described in paragraph (1) of this subsection during a demonstration year will be allowed to fund the remaining payments at the time of the final payment for that demonstration year. The IGT will be applied in the following order:

(A) To the final payment up to the maximum amount;

(B) To remaining balances for prior payment periods in the demonstration year.



(i) Reconciliation. HHSC will reconcile actual costs incurred by the hospital for the demonstration year with uncompensated-care payments, if any, made to the hospital for the same period:

(1) If a hospital received payments in excess of its actual costs, the overpaid amount will be recouped from the hospital, as described in subsection (j) of this section.

(2) If a hospital received payments less than its actual costs, and if HHSC has available waiver funding for the demonstration year in which the costs were accrued, the hospital may receive reimbursement for some or all of those actual documented unreimbursed costs.

(3) Except in demonstration year 2 (October 1, 2012, to September 30, 2013), if [H] a hospital submitted a request as described in subsection (g)(4)(A)(i) of this section that impacted its interim hospital-specific limit, that hospital will be subject to an additional reconciliation as follows:

(A) HHSC will compare the hospital's adjusted interim hospital-specific limit from subsection (g)(4)(A)(i) of this section for the demonstration year to its final hospital-specific limit as described in §355.8066(c)(2) of this title for the demonstration year.

(B) If the final hospital-specific limit is less than the adjusted interim hospital-specific limit, HHSC will recalculate the hospital's uncompensated-care payment for the demonstration year substituting the final hospital-specific limit for the adjusted interim hospital-specific limit with no other changes to the data used in the original calculation of the hospital's uncompensated-care payment other than any necessary reductions to the original IGT amount and will recoup any payment received by the hospital that is greater than the recalculated uncompensated-care payment. Recouped funds may be redistributed to other hospitals that received payments less than their actual costs.

(4) Each hospital that received an uncompensated-care payment during a demonstration year must cooperate in the reconciliation process by reporting its actual costs and payments for that period on the form provided by HHSC for that purpose, even if the hospital closed or withdrew from participation in the uncompensated-care program. If a hospital fails to cooperate in the reconciliation process, HHSC may recoup the full amount of uncompensated-care payments to the hospital for the period at issue.

(j) Recoupment.

(1) In the event of an overpayment identified by HHSC or a disallowance by CMS of federal financial participation related to a hospital's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or disallowance. The non-federal share of any funds recouped from the hospital will be returned to the entity that owns or is affiliated with the hospital.

(2) Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Chapter 403, Texas Government Code. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows:

(A) HHSC will recoup from the hospital against which any overpayment was made or disallowance was directed.

(B) If, within 30 days of the hospital's receipt of HHSC's written notice of recoupment, the hospital has not paid the full amount of the recoupment or entered into a written agreement

with HHSC to do so, HHSC may withhold any or all future Medicaid payments from the hospital until HHSC has recovered an amount equal to the amount overpaid or disallowed.

(k) Penalty for failure to complete Category 4 reporting requirements for Regional Healthcare Partnerships. Hospitals must comply with all Category 4 reporting requirements set out in Chapter 354 of this title, Subchapter D (relating to Texas Healthcare Transformation and Quality Improvement Program). If a hospital fails to complete required Category 4 reporting measures by the last quarter of a demonstration year:

(1) the hospital will forfeit its uncompensated-care payments for that quarter; or

(2) the hospital may request from HHSC a six-month extension from the end of the demonstration year to report any outstanding Category 4 measures.

(A) The fourth-quarter payment will be made upon completion of the outstanding required Category 4 measure reports within the six-month period.

(B) A hospital may receive only one six-month extension to complete required Category 4 reporting for each demonstration year.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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Texas Health and Human Services Commission

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For further information, please call: (512) 424-6863



## **TITLE 7. BANKING AND SECURITIES**

### **PART 8. JOINT FINANCIAL REGULATORY AGENCIES**

#### **CHAPTER 155. PAYOFF STATEMENTS**

##### **SUBCHAPTER A. REGISTRATION**

###### **7 TAC §155.2**

On behalf of the Finance Commission of Texas (commission), the Department of Savings and Mortgage Lending (SML), after reviewing and considering for re-adoption, revision, or repeal, Chapter 155 of Texas Administrative Code, Title 7, in its entirety (7 TAC §§155.1 - 155.3). The commission proposes an amendment to the form found at 7 TAC §155.2(c)(6).

Chapter 155 concerns payoff statements. Non-substantive formatting amendments are proposed to the form to make the version found in the *Texas Register* more user friendly and consistent with the version found on the Department of Savings and Mortgage Lending's website.

The review was conducted pursuant to Government Code, §2001.039 and in coordination with the Texas Department of

Banking (DOB) and the Office of the Consumer Credit Commissioner (OCCC).

SML, OCCC, and DOB held a stakeholder meeting and webinar regarding the rule review. SML, OCCC, and DOB received five informal written precomments, none of which proposed making any changes to the rules under review.

During the review, SML, OCCC, and DOB determined that the reasons for initially adopting the sections under review continue to exist, as the statute requiring it still exists, and Chapter 155 should be readopted with only a minor formatting amendment to the form found at 7 TAC §155.2(c)(6).

Ernest Garcia of SML, Christina Cuellar Hoke of the OCCC, and Jesse Moore of the DOB, have determined that for the first five-year period the proposed amended form is in use, there will be no fiscal implications for state or local government as a result of administering the amended optional form.

Ernest Garcia of SML, Huffman Lewis of the OCCC, and Jesse Moore of the DOB, have determined that for each year of the first five years the amended form is in use, the public benefits anticipated as a result of amending the form will be that the version found in the *Texas Register* will be more user friendly and consistent with the version found on the Department of Savings and Mortgage Lending's website. Further, that there is no anticipated cost to persons who are required to comply with the rule changes as proposed, and there will be no adverse economic effect on rural communities or small or micro-businesses. These determinations are in part based on stakeholder feedback indicating that a substantially similar form is already in use and/or a substantially similar fillable form is currently in use and available on SML's website. SML, OCCC, and DOB invite comments from stakeholders who believe there will be cost associated with the proposed amended form.

During the first five years the proposed amended form will be in use, the form will not create or eliminate a government program.

Implementation of the proposed amended form will not require the creation of new employee positions or the elimination of existing employee positions.

Implementation of the rule changes will not require an increase or decrease in future legislative appropriations to SML, the OCCC, or DOB because they are self-directed, semi-independent agencies that do not receive legislative appropriations. The proposed rule changes will not require an increase or decrease in fees paid to the agencies.

The proposed amended form creates a new regulation by making minor formatting amendments to an existing form. The proposed amended form does not expand, limit, or repeal an existing regulation. The proposed amended form does not increase or decrease the number of individuals subject to the rules' applicability. The agencies do not anticipate that the proposed amended form will have an effect on the state's economy, or any local economies.

To be considered, comments on the proposed amended form must be submitted in writing to Ernest C. Garcia, General Counsel, Department of Savings and Mortgage Lending, 2601 North Lamar Boulevard, Suite 201, Austin, Texas 78705-4294 or by email to [smlinfo@sml.texas.gov](mailto:smlinfo@sml.texas.gov) within 30 days of publication in the *Texas Register*.

The amendments to the form are proposed under Finance Code §343.106(b), which provides that the Finance Commission shall

adopt rules governing requests by title insurance companies for payoff information from mortgage servicers related to home loans and the provision of that information, including rules prescribing a standard payoff statement form.

Other statutes affected by the proposal are found in Finance Code Chapter 343.

#### *§155.2 Payoff Statement Form.*

(a) Requests made pursuant to this chapter shall be in writing and submitted to a mortgage servicer by mail, electronic mail or facsimile. If the mortgage servicer has designated a specific physical address; electronic mail address; and/or a specific representative to receive requests made pursuant to this chapter, then requests shall be submitted in accordance with such designation. Requests for a payoff statement made pursuant to this chapter shall, at a minimum, include the following:

- (1) Name of the mortgagor;
- (2) Physical address of the underlying collateral of the loan, or a legal description of the property; and
- (3) Proposed closing date of the loan.

(b) Upon receipt of a valid request made under subsection (a) of this section, a mortgage servicer shall provide, in writing, by mail or electronic mail, the payoff statement information for the home loan specified in the request which must be provided on the prescribed payoff statement form, Figure: 7 TAC §155.2(c)(6), or in a substantially similar format which contains all elements not indicated as optional on the prescribed payoff statement form. The statement must include the following information:

- (1) The proposed closing date for the sale or other transaction, as provided in the request made pursuant to this chapter;
- (2) The payoff amount that is valid through the proposed closing date; and
- (3) Sufficient information to identify the loan for which the payoff information is provided.

(c) If applicable, the payoff statement may contain:

- (1) Adjustable rate mortgage information;
- (2) Per diem amount;
- (3) Late charge information;
- (4) Escrow disbursement information;
- (5) A statement regarding which party is responsible for the release of lien; and
- (6) Other information necessary to provide a clear and concise payoff statement.

Figure: 7 TAC §155.2(c)(6)

[Figure: 7 TAC §155.2(c)(6)]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 17, 2019.

TRD-201904851



## TITLE 16. ECONOMIC REGULATION

### PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

#### CHAPTER 82. BARBERS

**16 TAC §§82.10, 82.20 - 82.22, 82.28, 82.52, 82.70, 82.72, 82.74, 82.77, 82.80, 82.120**

The Texas Department of Licensing and Regulation (Department) proposes amendment to existing rules at 16 Texas Administrative Code (TAC), Chapter 82, §§82.10; 82.20 - 82.22; 82.28; 82.52; 82.70; 82.72; 82.74; 82.80; 82.120; and new rule §82.77, regarding the Barbers Program. These proposed changes are referred to as "proposed rules."

#### EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 82 implement Texas Occupations Code, Chapter 1601, Barbers and Chapter 1603, Regulations of Barbering and Cosmetology.

The proposed rules implement necessary changes as required by House Bill (HB) 2847, 86th Legislature, Regular Session (2019).

As required by HB 2847, the proposed rules increase the inspection cycle for establishments that provide certain services and provide for the regulation of remote service businesses and digitally prearranged remote services.

The proposed rules also include recommendations from the Advisory Board's workgroups to reduce regulatory burdens by removing outdated requirements for schools and provide more clarity to the industry by using more updated and standardized terminology.

The proposed rules include a recommendation from the Advisory Board to lower the number of hours required to obtain a Class A Barber license from 1,500 to 1,000 hours.

The proposed rules were presented to and discussed by the Advisory Board on Barbering (Advisory Board) at its meeting on November 4, 2019. The Advisory Board did not make any changes to the proposed rules. The Advisory Board voted and recommended that the proposed rules be published in the *Texas Register* for public comment.

#### SECTION-BY-SECTION SUMMARY

The proposed rules amend §82.10 by adding definitions for "Digital Network," "Digitally Prearranged Remote Service," and "Remote Service Business." The proposed rules update terminology by removing the incorrect term of "reciprocity" and replacing it with the term "substantial equivalence."

The proposed rules amend §82.20 by adding the term "standards" after "curriculum" for clarity, providing for the orderly transition from 1,500 to 1,000-hours for students and schools, and establishing requirements for individuals to notify the Depart-

ment of their intention to operate a remote service business as established by HB 2847.

The proposed rules amend §82.21 by removing the term "curriculum" for clarity, allowing for examinees to have the option of using a live model or mannequin to perform their practical exam; and removing requirements for 1,500-hour programs.

The proposed rules amend §82.22 by establishing requirements for barbershops, specialty shops, dual shops, mobile shops, mini-barbershops, or mini-dual shops to notify the Department of their intention to operate a remote service business as established by HB 2847.

The proposed rules amend §82.28 by updating incorrect use of the term "reciprocity" with the term "substantial equivalence" and lowers the number of hours required for training from 1,500 to 1,000 hours for substantial equivalence.

The proposed rules amend §82.52 by increasing the inspection cycle for certain barbershops, specialty shops, dual shops, mini-barbershops, and mini-dual shops from two to four years. Barbershops, specialty shops, dual shops, mini-barbershops, and mini-dual shops that practice: treating a person's nails by cutting, trimming, polishing, tinting, coloring, cleansing, manicuring, or pedicuring; or attaching false nails; or massaging, cleansing, treating, or beautifying a person's hands will remain on a two-year inspection cycle.

The proposed rules amend §82.70 by clarifying that a licensee performing digitally prearranged remote services is allowed to perform these services at a location other than a licensed facility if the appointment is made through a remote service business's digital network. These proposed rules implement HB 2847.

The proposed rules amend §82.72 by updating language and equipment requirements for barber schools by removing outdated requirements to remove regulatory burdens and provide clarity.

The proposed rules amend §82.74 by rewording subsection (a) for clarity and correctly referencing "class" days instead of "barber curriculum" days and changes the required hours for out-of-state transfer students from 1,500 to 1,000.

The proposed rules add new §82.77 regarding remote service business responsibilities. The proposed new rule outlines the requirements for operating a remote service business and the digitally prearranged remote services that may or may not be performed by a licensee working for a remote service business. This new rule implements HB 2847.

The proposed rules amend §82.80 by replacing the incorrect use of the term "reciprocity" with "substantial equivalence."

The proposed rules amend §82.120 by adding the term "standards" after "curriculum" for clarity, lowering the number of curriculum hours required for a Class A Barber license from 1,500 to 1,000, and updating the curriculum standards for both Class A Barber private and public post-secondary barber schools and for high schools.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules.

The proposed rules impact barbering services but do not impact program costs. The reduction in the number of curriculum hours for the Class A Barber license will require recertification of the curriculum at each school that chooses to lower the hours taught. These recertifications can be accomplished with current agency resources so no increase in costs to the State is necessary. The establishment of remote service businesses and the change of the inspection cycle for certain barbershops, specialty shops, dual shops, mini-barbershops, and mini-dual shops from two years to four years will not cause enough extra duties for the Department which would necessitate an increase in personnel or resources and thus an increase in costs or cause a reduction of costs to the state.

The remaining activities required to implement the proposed rule changes are one-time program administration tasks that are routine in nature, such as modifying or revising publications, forms or website information, which will not result in an increase in program costs. Additionally, the proposed changes will not result in a reduction in costs to the state because these proposed rules do not decrease the need for personnel or resources.

The proposed rule changes have no direct impact on local governments. Local governments do not regulate the Barbering profession and industry.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules.

The proposed rules for the reduction of hours required for a Class A Barber license will not affect the enrollment in barber schools and thus not affect the number of barber schools and cause a loss in revenue to the State.

The change in the frequency of periodic inspections for barber-shops, specialty shops, dual shops, mini-barbershops, and mini-dual shops will not result in a loss in revenue because these establishments do not pay a fee for inspections. There is no anticipated loss in State revenue, as the proposed rules do not amend or impact the fees assessed by the licensing program. The proposed rules will not increase revenue because there are no new licenses or fees being created by the proposed rules. Licensees who provide remote services will not have to pay any fees to the State to perform those services, therefore state revenue is not affected by the proposed rules for remote services. Additionally, there will be no fee charged by TDLR for submission of an existing Class A Barber curriculum for recertification because of the proposed reduction of hours.

There is no anticipated revenue loss or increase in revenue to local governments because fees associated with the program are remitted to the state and not to local governments. Additionally, the proposed rules make no changes to fees or processes that would affect the revenue of local governments.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022. There should be no impact to local employment since it is not anticipated that enough additional individuals will choose to become licensed as barbers or establishments because of the opportunity to provide remote services to affect local employment.

#### PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be more accessibility to barbering services and reduced regulatory burden on businesses, schools, and students.

The ability to offer remote services to the public will make some barbering services more accessible and convenient to the public because certain services will be able to be performed outside of a licensed establishment. The change in the frequency in inspections for some establishments with less risk to public health and safety allows TDLR to focus its resources in areas which will better protect the public. The removal of outdated requirements for a barber school, such as having a clock, bulletin board, chalkboard, and an instructor's desk in each classroom, will save barber school owners the cost of purchasing these items. Removing the outdated requirements will also eliminate the possibility of a barber school being found in violation for not having items that are not necessary for barbering instruction.

The removal of the requirement for a student examinee to bring another person to act as a model for the practical examination, and instead use a mannequin to demonstrate the practical work, could save students time, effort, and the expense of bringing another person to a testing center, if finding a volunteer proves to be a difficulty.

The reduction in curriculum hours needed to obtain a Class A Barber license will allow students seeking that license to complete their education quicker and, once they pass the examinations, they will be able to begin working that much sooner. Those students could also see a decrease in their school tuition to match the reduction in hours.

#### PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. There may be an initial cost to licensees seeking to provide digitally prearranged remote services, who will need to set up a digital network and comply with the requirements for providing digital services. However, no licensee is required to comply with the proposed rules for remote service businesses and therefore this would be a discretionary cost.

Any school which chooses to lower the number of hours in its Class A Barber curriculum will need to adjust their curriculum, in doing so the school may incur a cost. However, this cost will depend on the school's business model and the amount of resources it will have to expend, which will vary. Therefore, it is not possible to estimate this cost. A school that chooses to lower the number of hours in its Class A Barber curriculum will also need to have its curriculum recertified by the Department, but there will be no additional fee or costs for that recertification.

#### FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

(Gov't Code §2006.002)

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Since the agency has determined that the proposed rules will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

The proposed rules do not have an anticipated adverse economic effect on small businesses or micro-businesses. The proposed rules do not impose additional fees upon licensees or small/micro businesses, nor do they create requirements that would cause licensees or small/micro businesses to expend funds for equipment, staff, supplies, or infrastructure.

Individuals and businesses which choose to offer digitally prearranged remote services may incur a cost for setting up a digital network and meeting the other requirements for offering remote services. However, operating a remote service business is voluntary and any set-up costs are not expected to have an adverse economic impact on those who choose to offer the services.

Barber schools, which can be categorized as a small or micro-business, might have a cost for restructuring their Class A Barber curriculum, if they choose to lower the number of hours being taught. This cost is however, not expected to have an adverse economic impact on the business. Additionally, any costs that a school may incur for choosing to lower hours and their tuition for the Class A Barber course could be offset by the shorter period required for schooling. This means classes will be finishing in a shorter amount of time and the school will be able to start a new group of students sooner, which could prevent any decrease in tuition revenue from the shorter program.

#### ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

(Gov't Code §2001.0045)

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do create a new regulation.
6. The proposed rules do expand, limit, or repeal an existing regulation.
7. The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.
8. The proposed rules do not positively or adversely affect this state's economy.

HB 2847 created new regulation and expanded existing regulation by creating digitally prearranged remote services and remote service businesses. These proposed rules will allow a li-

censee to provide limited barber services directly to the client outside of a licensed facility. The limited services are set to safeguard public safety. Additionally, the proposed rules repeal the requirement for a barber school to purchase and have certain items in the school such as: a clock, bulletin board, chalk board, and an instructor's desk in each classroom.

#### TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

#### PUBLIC COMMENTS

Comments on the proposed rules may be submitted to Dalma Sotero, Assistant General Counsel, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: [erule.comments@tdlr.texas.gov](mailto:erule.comments@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

#### STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51, 1601, and 1603, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 1601, and 1603. No other statutes, articles, or codes are affected by the proposed rules.

#### §82.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (15) (No change.)

(16) Digital Network--Any online-enabled application, Internet website, or system offered or used by a remote service business that allows a client to arrange for a digitally prearranged remote service.

(17) Digitally Prearranged Remote Service--A barbering or cosmetology service performed for compensation by a person holding a license, certificate of registration, or permit under Texas Occupations Code, Chapter 1601 or 1602 or this chapter that is:

(A) prearranged through a digital network; and

(B) performed at a location other than a place of business that is licensed or permitted under Texas Occupations Code, Chapter 1601, 1602, or 1603.

(18) ~~[(16)]~~ Dual Shop--A shop owned, operated, or managed by a person holding a dual barber and beauty shop license issued under Texas Occupations Code, Chapter 1603.

(19) ~~[(17)]~~ Guest Presenter--A person who possesses subject matter knowledge in a specific curriculum topic and who has the teaching ability necessary to impart the information to students. Instruction is limited to the presenter's area of expertise and a licensed instructor must be present during the classroom sessions in order for students to earn hours.

(20) [(48)] Hair Relating to Haircutting--The hair extending from the scalp of the head is recognized as the hair trimmed, shaped or cut in the process of hair cutting.

(21) [(49)] Hair weaver--A person who holds a Hair Weaving Specialty Certificate of Registration and who may perform only the practice of barbering as defined in Texas Occupations Code, §1601.002(1)(H).

(22) [(20)] License--A license, permit, certificate, or registration issued under the authority of the Act.

(23) [(21)] License by Substantial Equivalence [reiprocity]--A process that permits a barber license holder from another jurisdiction or foreign country to obtain a Texas barber license without repeating barber education or examination license requirements.

(24) [(22)] Line of Demarcation between "the hair" and "the beard"--The demarcation boundary between scalp hair ("the hair") and facial hair ("the beard") is a horizontal line drawn from the bottom of the ear.

(25) [(23)] Manicurist--A person who holds a specialty license and who is authorized to practice the services defined in Texas Occupations Code §1601.002(1)(E) and (F).

(26) [(24)] Mini-Barbershop--A barber establishment in which a person practices barbering under a license, certificate, or permit issued under this chapter and which consists of a room or suite of rooms that is one of a number of connected establishments in a single premises that open onto a common hallway or common area.

(27) [(25)] Mini-Dual Shop--A shop owned, operated, or managed by a person holding a mini-barber and mini-beauty shop license under Texas Occupations Code §1603.207.

(28) [(26)] Mini-Barbershop Permittee--A person or entity that holds a license for a mini-barbershop or mini-dual shop. The mini-barbershop permittee shall be responsible for rules under Texas Occupations Code, Chapters 1601, 1602, and 1603 and 16 TAC Chapters 82 and 83 for its mini-barbershop or mini-dual shop.

(29) [(27)] Mobile Shop--A barbershop, specialty shop, or dual shop that is operated in a self-contained, self-supporting, enclosed mobile unit.

(30) [(28)] Provisional license--A license that allows a person to practice barbering in Texas pending the department's approval or denial of that person's application for licensure by substantial equivalence [reiprocity].

(31) Remote Service Business--A corporation, partnership, sole proprietorship, or other entity that, for compensation, enables a client to schedule a digitally prearranged remote service with a person holding a license, certificate of registration, or permit under Texas Occupations Code, Chapters 1601, 1602, or 1603.

(32) [(29)] Self-Contained--Containing within itself all that is necessary to be able to operate without connecting to outside utilities such as water and electricity.

(33) [(30)] Sideburn--Part of a haircut or style that is a continuation of the natural scalp hair growth, does not extend below the line of demarcation, and is not connected to any other bearded area on the face.

(34) [(31)] Special Event--Includes weddings, quinceaneras, pageants, proms, debutante balls, birthday parties, religious and cultural ceremonies, and on-stage performances.

(35) [(32)] Specialty Instructor--A person authorized by the department to perform or offer instruction in an act or practice of barbering limited to Texas Occupations Code §1601.002(1)(C) - (H).

(36) [(33)] Specialty Shop--A barber establishment in which only the practice of barbering as defined in Texas Occupations Code §1601.002(1)(E), (F), or (H) is performed.

(37) [(34)] Student Permit--A permit issued by the department to a student enrolled in barber school which states the student's name and the name of the school. A person holding an active student permit may shampoo and condition a person's hair in a facility licensed under Texas Occupations Code, Chapters 1601 and 1603.

(38) [(35)] Weaving--The process of attaching, by any method, commercial hair (hair pieces, hair extensions) to a client's hair and/or scalp. Weaving is also known as hair integration or hair intensification.

#### §82.20. License Requirements--Individuals.

(a) To be eligible for a Class A Barber Certificate, Barber Instructor License, Barber Technician License, Manicurist License, Barber Technician/Manicurist License, Barber Technician/Hair Weaving License or Hair Weaving Specialty Certificate of Registration, an applicant must:

(1) - (3) (No change.)

(4) meet other applicable requirements of the Act, this section, and the applicable curriculum standards set forth in §82.120.

(b) To be eligible for a Student Permit, an applicant must:

(1) - (2) (No change.)

(3) meet other applicable requirements of the Act, this section and the applicable curriculum standards set forth in §82.120.

(c) - (k) (No change.)

(l) To operate a remote service business an individual must be licensed to practice barbering and must:

(1) in a manner prescribed by the department, notify the department of the intent to operate a remote service business;

(2) provide a permanent mailing address; and

(3) verify that the remote service business complies with the requirements of the Act and this chapter.

(m) The purpose of this transition rule is to provide guidance on how to implement the transition from 1,500 to 1,000 hours.

(1) Beginning January 1, 2020, the department may allow students enrolled on or after January 1, 2020 in a 1,500-hour program to transfer hours towards a 1,000-hour program if the hours meet the required technical standards. A student enrolling in barber school on or after January 1, 2020 may request to transfer completed hours of a 1,500-hour program towards an approved 1,000-hour program or to transfer to another school.

(2) Upon request of a student enrolled on or after January 1, 2020, the school must apply hours earned towards a 1,000-hour program if the school has an approved 1,000-hour program or allow the student to transfer to another school. This rule expires on December 1, 2020.

#### §82.21. License Requirements--Examinations.

(a) To be eligible for a department examination, an applicant must:

(1) - (2) (No change.)

(3) have completed the number of [curriculum] hours required by this chapter and the Act.

(b) ~~[For a Class A barber certificate, a student enrolled in a 1,500-hour program is eligible to take the written examination when the department receives proof of completion of 1,000 curriculum hours.]~~ A student enrolled in a 1,000-hour ~~[1,000-hour]~~ program is eligible to take the written examination when the department receives proof of completion of 900 ~~[curriculum]~~ hours.

(c) - (e) (No change.)

(f) The examinee ~~may~~ shall provide a model, of 16 years of age or older, on whom to demonstrate the practical work. The department may require parental approval for models under 18 years of age.

(g) - (j) (No change.)

*§82.22. Permit Requirements--Barbershops, Specialty Shops, Dual Shops, Mini-Barbershops, Mini-Dual Shops, Mobile Shops, and Booth Rental.*

(a) - (h) (No change.)

(i) To operate a remote service business, a Barbershop, specialty shop, dual shop, mobile shop, mini-barbershop, or mini-dual shop must:

(1) in a manner prescribed by the department, notify the department of the intent to operate a remote service business;

(2) provide a permanent mailing address; and

(3) verify that the remote service business complies with the requirements of the Act and this chapter.

*§82.28. Substantial Equivalence ~~[Reciprocity]~~ or Endorsement and Provisional Licensure.*

(a) (No change.)

(b) Applicant must:

(1) (No change.)

(2) pay the fee for license by substantial equivalence ~~[reciprocity]~~, the applicable license application fee, and the law and rules book fee, under §82.80;

(3) - (5) (No change.)

(c) Texas requires 1,000 ~~[1,500]~~ hours of training substantially equivalent to the Texas curriculum. If the applicant graduated in a state that required less than 1,000 ~~[1,500]~~ hours, documented work experience may be substituted at the rate of 25 hours per month worked, up to a maximum of 500 hours, or the applicant must complete the balance of hours required in an approved Texas barber school.

(d) (No change.)

(e) The department may issue a provisional license to applicants currently licensed in another jurisdiction who file an application for a Texas barber license by substantial equivalence ~~[reciprocity]~~.

(f) To be eligible for a provisional license, an applicant must:

(1) file a completed application for a Texas barber license by substantial equivalence ~~[reciprocity]~~;

(2) - (3) (No change.)

(g) A person issued a provisional license may perform those acts of barbering authorized by the provisional certificate or license pending the department's approval or denial of an applicant's license by substantial equivalence ~~[reciprocity]~~.

(h) A provisional certificate or license is valid until the date the department approves or denies the application for licensure by substantial equivalence ~~[reciprocity]~~. The department must approve or deny a provisional certificate or license holder's application for a certificate or license by substantial equivalence ~~[reciprocity]~~ not later than the 180th day after the date the provisional certificate or license is issued.

(i) The department shall issue a certificate or license by substantial equivalence ~~[reciprocity]~~ to the provisional certificate or license holder if the person is eligible to hold a certificate or license under the Act.

(j) An applicant for licensure by substantial equivalence ~~[reciprocity]~~ is eligible for a provisional certificate or license only once. A person who is denied licensure by substantial equivalence ~~[reciprocity]~~ and subsequently reapplies for licensure by substantial equivalence ~~[reciprocity]~~ is not eligible to obtain additional provisional certificates or licenses to practice barbering in Texas.

*§82.52. Periodic Inspections.*

(a) Except as provided by subsection (b), each ~~[Each]~~ barber-shop, specialty shop, dual shop, mini-barbershop, and mini-dual shop shall be inspected at least once every four ~~[two]~~ years. Each barber school shall be inspected at least twice per year.

(b) At least once every two years, the department shall inspect specialty shops that hold a license, certificate or permit at which the practices described in Texas Occupations Code, §§1601.002(1)(E) or (F) or 1602.002(a)(8) or (9) are performed

(c) ~~[(b)]~~ The barbershop, specialty shop, dual shop, mini-barbershop, or mini-dual shop owner, manager, or their representative must, upon request, make available to the inspector the list required by §82.71(c) of all individuals who work in the shop.

(d) ~~[(e)]~~ Upon completion of the inspection, the owner shall be advised in writing of the results. The inspection report will indicate whether the inspection was approved or not approved, and will describe any violations identified during the inspection.

(e) ~~[(d)]~~ For inspections that are not approved, the inspection report will identify violations that must be corrected by the owner. The report will also indicate the corrective modifications required to address the violations, in accordance with §82.54. Additionally, the department may assess administrative penalties and/or administrative sanctions for violations, in accordance with §82.90.

(f) ~~[(e)]~~ Based on the results of the periodic inspection, a barber establishment found out of compliance may be reinspected.

*§82.70. Responsibilities of Individuals.*

(a) - (b) (No change.)

(c) A licensee performing digitally prearranged remote services may perform these services at a location other than a licensed facility if the appointment is made through a remote service business's digital network.

(d) ~~[(e)]~~ Only a permitted barber school, barbershop, mini-barbershop, specialty shop, dual shop, mini-dual shop, mobile shop, or a licensed barber may advertise as a "Barber."

(e) ~~[(d)]~~ License holders, including Class A barbers, barber instructors, barber technicians, barber technician/manicurists, barber technician/hair weavers, hair weavers, manicurists, and specialty instructors are responsible for compliance with the health and safety standards of this chapter.

(f) ~~[(e)]~~ Licensees shall wear clean top and bottom outer garments and footwear while performing services authorized under the

Act. Outer garments include tee shirts, blouses, sweaters, dresses, smocks, pants, jeans, shorts, and other similar clothing and does not include lingerie or see-through fabric.

(g) [(f)] Licensees shall notify the department in writing of any name change within thirty days of the change.

(h) [(g)] Licensees shall maintain a current mailing address on file with the department and must notify the department within thirty days following any change of mailing address.

(i) [(h)] Barbers, manicurists, barber instructors, specialty instructors, barber technicians, barber technician/manicurists, barber technician/hair weavers, or hair weavers who lease space on the premises of a barbershop, dual shop, or specialty shop to engage in the practice of barbering as an independent contractor must hold a booth rental permit.

§82.72. *Responsibilities of Barber Schools.*

(a) - (c) (No change.)

(d) A [The] barber school must issue within seven days of enrollment each student his or her own textbook or books which shall contain all subjects referred to in Texas Occupations Code §1601.558. The department must approve each textbook or books before it may be used in a [the] barber school [curriculum].

(e) - (f) (No change.)

(g) Each barber school shall have:

(1) - (2) (No change.)

(3) a [minimum of two canvas-type] wig block [blocks];

(4) - (5) (No change.)

[(6) elock;]

[(7) bulletin board;]

[(8) chalk board or dry erase board;]

(6) [(9)] one hooded hair dryer;

[(10) fire extinguisher with current inspection report;]

[(11)] [instructor's desk in classroom;] and

(7) [(12)] if providing manicure or pedicure nail services, an autoclave, dry heat sterilizer or ultraviolet sanitizer.

(h) - (n) (No change.)

(o) A barber school offering distance education must:

(1) - (2) (No change.)

(3) comply with the curriculum standard requirements set forth in §82.120 by limiting distance education to the maximum number of theory hours designated for each course type.

(p) - (x) (No change.)

(y) A school shall maintain and have available for department and/or student inspection the monthly progress report required by Texas Occupations Code, §1601.561(a), documenting the daily attendance record of each student and number of credit hours earned. The school shall maintain the monthly progress report throughout the period of the student's enrollment and for 48 months after the student completes the curriculum standards, withdraws, or is terminated.

(z) - (dd) (No change.)

§82.74. *Responsibilities--Withdrawal, Reentry, or Transfer of Student.*

(a) Withdrawal. Except for a documented leave of absence, schools shall electronically submit a student's withdrawal or termination to the department within 10 calendar days after the withdrawal or termination. Except for a documented leave of absence, a school shall terminate a student who does not attend class [a barber curriculum] for 30 consecutive days.

(b) - (c) (No change.)

(d) Transfer of student hours from out of state.

(1) (No change.)

(2) If the student has not completed 1,000 [1,500] hours in another state, credit for hours completed will be given when he or she is enrolled in a Texas barber school and when a student permit is issued.

§82.77. *Remote Service Business Responsibilities.*

(a) A licensee may not operate a remote service business without first providing notice to the department in accordance with this chapter.

(b) Only licensed individuals may perform digitally prearranged remote services.

(c) A remote service business must comply with the requirements of the Act, this chapter, and all health and safety requirements, as applicable.

(d) A remote service business may not offer a barbering service that requires treating or removing a person's hair by:

(1) coloring;

(2) processing;

(3) bleaching;

(4) dyeing;

(5) tinting; or

(6) using a cosmetic preparation.

(e) A remote service business may offer only the following barbering services:

(1) haircutting, hairstyling, wigs, artificial hairpieces, or weaving a person's hair by thread and needle or attaching by clamps or glue;

(2) arranging, beautifying, shaving, styling, or trimming a person's mustache or beard;

(3) beautifying a person's face, neck, or arms using, anti-septic, tonic, lotion, powder, oil, clay, or cream;

(4) removing superfluous hair on the face using tweezers; and

(5) massaging, cleansing and treating person's hands or feet for polish change manicures and pedicures, and non-whirlpool foot basin pedicures only.

(f) A remote service business may not offer portable whirlpool foot spa pedicures.

(g) A licensed individual performing digitally prearranged remote services must practice within the scope of the individual's license and may only provide the services specifically authorized by this section.

(h) A remote service business shall provide through the business's digital network prior to any digitally prearranged remote service being performed:



(1) the following information regarding the licensee who will perform the service:

(A) the person's first and last name;

(B) the person's license number, certificate of registration, or permit number, as applicable; and

(C) a photograph of the person who will be performing the remote services;

(2) the following information regarding the business:

(A) Internet website address; and

(B) telephone number; and

(3) the department's Internet website address and telephone number and notice that the client may contact the department to file a complaint against the remote service business or licensed individual performing the service.

(i) A remote service business shall maintain records and information showing compliance with this chapter and the Act until at least the fifth anniversary of the date the record was generated.

(j) A licensee who provides a digitally prearranged remote services is responsible for the services provided.

(k) A remote service business shall terminate a licensee's access to the business's digital network if the remote service business or department determine there has been a violation of:

(1) this chapter; or

(2) the Act.

(l) Before a licensee provides a digitally prearranged remote service, the remote service business and the licensee must ensure that all implements and supplies have been cleaned, disinfected, and sanitized or sterilized with department-approved disinfectants and in accordance with the requirements of the Act and this chapter.

(m) A remote service business and licensee performing remote services must ensure compliance with all safety and sanitation requirements related to the digitally prearranged remote services being provided and in accordance with the Act and this chapter.

(n) A remote service business shall maintain accurate records and information showing compliance with this chapter and the Act and must make these records available to the department upon request.

#### §82.80. Fees.

(a) - (b) (No changes.)

(c) Substantial equivalence [~~Reciprocity~~] or Endorsement Fee--\$55

(d) - (j) (No changes.)

#### §82.120. Technical Requirements--Curricula Standards.

(a) (No change.)

(b) The curriculum standards for the 750 hour barber instructor license must be completed in a course of not less than 20 weeks as follows:

Figure: 16 TAC §82.120(b)

[Figure: 16 TAC §82.120(b)]

(c) The curriculum standards for the barber instructor license with one year experience consists of 500 hours to be completed in a course of not less than 13 weeks as follows:

Figure: 16 TAC §82.120(c)

[Figure: 16 TAC §82.120(e)]

(d) The curriculum standards for the class A barber certificate in a private or public post-secondary barber school consists of 1,000 [1,500] hours, to be completed in a course of not less than six [nine] months, as follows:

Figure: 16 TAC §82.120(d)

[Figure: 16 TAC §82.120(d)]

(e) The curriculum standards for the class A barber certificate while holding a cosmetology operator license consists of 300 hours, to be completed in a course of not less than 9 weeks, as follows:

Figure: 16 TAC §82.120(e)

[Figure: 16 TAC §82.120(e)]

(f) The curriculum standards for the class A barber certificate in a public secondary program for high school students consists of 1,000 hours of instruction in barber courses and 500 hours of related high school courses prescribed by the commission in a vocational barber program in a public school to be completed in a course of not less than six months, with the 1,000 hours as follows:

Figure: 16 TAC §82.120(f)

[Figure: 16 TAC §82.120(f)]

(g) The curriculum standards for the manicurist license consists of 600 hours, to be completed in a course of not less than 16 weeks, as follows:

Figure: 16 TAC §82.120(g)

[Figure: 16 TAC §82.120(g)]

(h) The curriculum standards for the barber technician/manicurist license consists of 900 hours; to be completed in a course of not less than 24 weeks, as follows:

Figure: 16 TAC §82.120(h)

[Figure: 16 TAC §82.120(h)]

(i) The curriculum standards for the barber technician/hair weaving license consists of 600 hours to be completed in a course of not less than 16 weeks, as follows:

Figure: 16 TAC §82.120(i)

[Figure: 16 TAC §82.120(i)]

(j) The curriculum standards for the barber technician license consists of 300 hours, to be completed in a course of not less than 8 weeks, as follows:

Figure: 16 TAC §82.120(j)

[Figure: 16 TAC §82.120(j)]

(k) The curriculum standards for the hair weaving specialty certificate of registration consists of 300 hours as follows:

Figure: 16 TAC §82.120(k)

[Figure: 16 TAC §82.120(k)]

(l) Field Trips

(1) (No change.)

(2) A student may obtain the following field trip [curriculum] hours:

~~[(A) a maximum of 75 hours out of the 1,500 hour Class A Barber course;]~~

(A) ~~[(B)]~~ a maximum of 50 hours out of the 1,000 hour class A Barber course;

(B) ~~[(C)]~~ a maximum of 30 hours for the Manicure course;

(C) ~~[(D)]~~ a maximum of 20 hours for the Barber Technician course;

(D) ~~[(E)]~~ a maximum of 45 hours for the Barber Technician/Manicurist course;

(E) [(F)] a maximum of 30 hours for the Barber Technician/Hair Weaving course;

(F) [(G)] a maximum of 20 hours for the Hair Weaving course;

(G) [(H)] a maximum of 35 hours for the 750 hour Instructor course;

(H) [(I)] a maximum of 25 hours for the 500 hour Instructor course; and

(I) [(J)] a maximum of 15 hours for the Cosmetology Operator to Class A Barber course.

(3) - (5) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 463-8179



## CHAPTER 83. COSMETOLOGISTS

**16 TAC §§83.10, 83.20 - 83.23, 83.25, 83.28, 83.52, 83.70, 83.72, 83.74, 83.77, 83.80, 83.120**

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 83, §§83.10; 83.20 - 83.23; 83.25; 83.28; 83.52; 83.70; 83.72; 83.74; 83.80; and 83.120; and new rule §83.77, regarding the Cosmetologist Program. These proposed changes are referred to as "proposed rules."

### EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 83 implement Texas Occupations Code, Chapter 1602, Regulation of Cosmetology, and Chapter 1603, Regulation of Barbering and Cosmetology.

The proposed rules implement necessary changes as required by House Bill (HB) 2847, 86th Legislature, Regular Session (2019).

As required by HB 2847 the proposed rules lower the number of hours required to obtain an Operator License from 1,500 to 1,000, increase the inspection cycle for establishments that provide certain services, and provide for the regulation of remote service businesses and digitally prearranged remote services.

The proposed rules also include recommendations from the Advisory Board's workgroups to reduce regulatory burdens and providing more clarity to the industry by using more updated and standardized terminology.

The proposed rules and options for the 1000-hour curriculum standards were presented to and discussed by the Advisory Board on Cosmetology (Advisory Board) at its meeting on November 18, 2019. The Advisory Board did not make any other changes to the proposed rules and after considering the

options, recommended a curriculum standard for publication. The Advisory Board voted and recommended that the proposed rules be published in the Texas Register for public comment.

### SECTION-BY-SECTION SUMMARY

The proposed rules amend §83.10, by adding definitions for "Digital Network," "Digitally Prearranged Remote Service," and "Remote Service Business." The proposed rules update terminology by removing the incorrect term of "reciprocity", replacing it with the term "substantial equivalence." The proposed rules update the scope for certain license types as required by HB 2847 and add the term "standards" after "curriculum."

The proposed rules amend §83.20, by adding the term "standards" after "curriculum" for clarity, lowering the number of hours required to obtain an Operator License from 1,500 to 1,000, providing for the orderly transition from 1,500 to 1,000-hours for students and schools, and establishing requirements for individuals to notify the Department of their intention to operate a remote service business as established by HB 2847.

The proposed rules amend §83.21, by removing the term "curriculum" for clarity and removing requirements for 1,500-hour program.

The proposed rules amend §83.22, by establishing requirements for beauty salons, specialty salons, dual shops, mobile shops, mini salons, or mini-dual shops to notify the Department of their intention to operate a remote service business as established by HB 2847.

The proposed rules amend §83.23, by updating language for clarity on certificates of approval for curriculum standards.

The proposed rules amend §83.25, by adding the term "standards" after "curriculum" for clarity.

The proposed rules amend §83.28, by updating incorrect use of the term "reciprocity" with the term "substantial equivalence."

The proposed rules amend §83.52, by increasing the inspection cycle for certain beauty salons, specialty salons, dual shops, mini-salons, or mini-dual shops from two to four years. Beauty salons, specialty salons, dual shops, mini-salons, or mini-dual shops that practice: treating a person's nails by cutting, trimming, polishing, tinting, coloring, cleansing, manicuring, or pedicuring; or attaching false nails; or massaging, cleansing, treating, or beautifying a person's hands will remain on a two-year inspection cycle.

The proposed rules amend §83.70, by clarifying that a licensee performing digitally prearranged remote services is allowed to perform these services at a location other than a licensed facility, if the appointment is made through a remote service business's digital network. These proposed rules implement HB 2847.

The proposed rules amend §83.72, by adding the term "standards" after "curriculum" for clarity and updating language and equipment requirements for beauty culture schools to remove regulatory burdens and provide clarity.

The proposed rules amend §83.74, by adding the term "standards" after "curriculum" for clarity.

The proposed rules add new §83.77 regarding remote service business responsibilities. The proposed new rule outlines the requirements for operating a remote service business and the digitally prearranged remote services that may or may not be performed by a licensee working for a remote service business. This new rule implements HB 2847.

The proposed rules amend §83.80, by replacing the incorrect use of the term "reciprocity" with "substantial equivalence."

The proposed rules amend §83.120, by adding the term "standards" after "curriculum" for clarity, lowering the number of curriculum hours required for an Operator license from 1,500 to 1,000 and updating the curriculum standards for both private and public post-secondary cosmetology schools and for high schools.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules.

The proposed rules impact cosmetology services but do not impact program costs. The reduction in the number of curriculum hours for the Operator license will require recertification of the curriculum at each school that chooses to lower the hours taught. These recertifications can be accomplished with current agency resources so no increase in costs to the State is necessary. The establishment of remote service businesses and the change of the inspection cycle for certain beauty salons, specialty salons, dual shops, mini-salons, or mini-dual shops from two years to four years will not cause enough extra duties for the Department, which would necessitate an increase in personnel or resources and thus an increase in costs or cause a reduction of costs to the state.

The remaining activities required to implement the proposed rule changes are one-time program administration tasks that are routine in nature, such as modifying or revising publications, forms or website information, which will not result in an increase in program costs. Additionally, the proposed changes will not result in a reduction in costs to the state because these proposed rules do not decrease the need for personnel or resources.

The proposed rule changes have no direct impact on local governments. Local governments do not regulate the Cosmetology profession and industry.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules.

The proposed rules for the reduction of hours required for an Operator license will not affect the enrollment in cosmetology schools and thus not affect the number of cosmetology schools and cause a loss in revenue to the State.

The change in the frequency of periodic inspections for beauty salons, specialty salons, dual shops, mini-salons, or mini-dual shops will not result in a loss in revenue because these establishments do not pay a fee for inspections. There is no anticipated loss in State revenue, as the proposed rules do not amend or impact the fees assessed by the licensing program. The proposed rules will not increase revenue because there are no new licenses or fees being created by the proposed rules. Licensees who provide remote services will not have to pay any fees to the State to perform those services, therefore state revenue is not affected by the proposed rules for remote services. Additionally, there will be no fee charged by TDLR for submission of an existing Operator curriculum for recertification because of the proposed reduction of hours.

There is no anticipated revenue loss or increase in revenue to local governments because fees associated with the program are remitted to the state and not to local governments. Additionally, the proposed rules make no changes to fees or processes that would affect the revenue of local governments.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

There should be no impact to local employment since it is not anticipated that enough additional individuals will choose to become licensed as cosmetologist or establishments because of the opportunity to provide remote services to affect local employment.

#### PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be more accessibility to cosmetology services and reduced regulatory burden on businesses, schools, and students.

The ability to offer remote services to the public will make some cosmetology services more accessible and convenient to the public because certain services will be able to be performed outside of a licensed establishment. The change in the frequency in inspections for some establishments with less risk to public health and safety allows the Department to focus its resources in areas which will better protect the public. The removal of an outdated requirement for a beauty culture school, such as having a medical dictionary and updating terminology to reflect more current mediums for teaching will save school owners the cost of purchasing these items and eliminate the possibility of a schools being found in violation of the rules.

The reduction in curriculum hours needed to obtain an Operator license will allow students seeking that license to complete their education quicker and, once they pass the examinations, they will be able to begin working that much sooner. Those students could also see a decrease in their school tuition to match the reduction in hours.

#### PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. There may be an initial cost to licensees seeking to provide digitally prearranged remote services, who will need to set up a digital network and comply with the requirements for providing digital services. However, no licensee is required to comply with the proposed rules for remote service businesses and therefore this would be a discretionary cost.

Schools lowering the number of hours in its Operator curriculum will be required to adjust their curriculum, in doing so the school may incur a cost. However, this cost will depend on the school's business model and the amount of resources it will have to expend, which will vary. Therefore, it is not possible to estimate this cost. A school will also need to have its curriculum recertified by the Department, but there will be no additional fee or costs for that recertification.

#### FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Since the agency has determined that the proposed rules will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

The proposed rules do not have an anticipated adverse economic effect on small businesses or micro-businesses. The proposed rules do not impose additional fees upon licensees or small/micro businesses, nor do they create requirements that would cause licensees or small/micro businesses to expend funds for equipment, staff, supplies, or infrastructure.

Individuals and businesses which choose to offer digitally prearranged remote services may incur a cost for setting up a digital network and meeting the other requirements for offering remote services. However, operating a remote service business is voluntary and any set-up costs are not expected to have an adverse economic impact on those who choose to offer the services.

Schools, which can be categorized as a small or micro-business, might have a cost for restructuring their Operator curriculum when lower the number of hours being taught. This cost is however, not expected to have an adverse economic impact on the business. Additionally, any costs that a school may incur for lowering hours and their tuition for the Operator course could be offset by the shorter period required for schooling. This means classes will be finishing in a shorter amount of time and the school will be able to start a new group of students sooner, which could prevent any decrease in tuition revenue from the shorter program.

#### ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do create a new regulation.
6. The proposed rules do expand, limit, or repeal an existing regulation.
7. The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed rules do not positively or adversely affect this state's economy.

HB 2847 created new regulation and expanded existing regulation by creating digitally prearranged remote services and remote service businesses. These proposed rules will allow a licensee to provide limited barber services directly to the client outside of a licensed facility. The limited services are set to safeguard public safety.

The additions to scope for certain license types are added only to correct inadvertent omissions from previous revision to the cosmetology statute. The proposed rules merely update the definitions to reflect what is currently in practice.

#### TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

#### PUBLIC COMMENTS

Comments on the proposed rules may be submitted to Dalma Sotero, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: [erule.comments@tdlr.texas.gov](mailto:erule.comments@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

#### STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51, 1602, and 1603, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 1601, and 1603. No other statutes, articles, or codes are affected by the proposed rules.

#### §83.10. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (8) (No change.)

(9) Digital Network--Any online-enabled application, Internet website, or system offered or used by a remote service business that allows a client to arrange for a digitally prearranged remote service.

(10) Digitally Prearranged Remote Service--A barbering or cosmetology service performed for compensation by a person holding a license, certificate of registration, or permit under Texas Occupations Code, Chapter 1601, or 1602, or this chapter that is:

(A) prearranged through a digital network; and

(B) performed at a location other than a place of business that is licensed or permitted under Texas Occupations Code, Chapter 1601, 1602, or 1603.

(11) [(9)] Distance Education--A formal instructional process in which the student and teacher are separated by physical

distance and a variety of communication technologies are used to deliver instruction in theory to the student. Courses taught by distance education do not satisfy the requirements of the practical portion of the course curriculum standards.

(12) [(40)] Dual Shop--A shop owned, operated, or managed by a person holding a dual barber and beauty shop license issued under Texas Occupations Code, Chapter 1603.

(13) [(41)] Eyelash Extension Application--The process of applying and removing a semi-permanent, thread-like, natural or synthetic single fiber to an eyelash, including cleansing of the eye area and lashes prior to applying and after removing extensions.

(14) [(42)] Eyelash Extension Specialist--A person who holds a specialty license and who is authorized to practice the service defined in Texas Occupations Code §1602.002(a)(10).

(15) [(43)] Esthetician--A person who holds a specialty license and who is authorized to practice the services defined in Texas Occupations Code §1602.002(a)(4) - (7) and (10). The term esthetician in this chapter includes the term facialist.

(16) [(44)] Esthetician/Manicurist--An esthetician/manicurist may perform only those services defined in Texas Occupations Code §1602.002(a)(4) - (10) [§1602.002(a)(4) - (9)].

(17) [(45)] Guest Presenter--A person who possesses subject matter knowledge in specific curriculum topics and who has the teaching ability necessary to impart the information to cosmetology students. Instruction is limited to the presenter's area of expertise and a licensed instructor must be present during the classroom session in order for students to earn hours.

(18) [(46)] Hair weaver--A person who holds a hair weaving specialty certificate and who may perform only the practice of cosmetology defined in Texas Occupations Code §1602.002(a)(11).

(19) [(47)] Instructor--An individual authorized by the department to perform or offer instruction in any act or practice of cosmetology under Texas Occupations Code, §1602.002.

(20) [(48)] Law and Rules Book--Texas Occupations Code, Chapters 1602 and 1603, and 16 Texas Administrative Code Chapter 83.

(21) [(49)] License--A department-issued permit, certificate, approval, registration, or other similar permission required under Texas Occupations Code, Chapter 1601, 1602, or 1603.

(22) [(20)] License by substantial equivalence [reciprocity]--A process that permits a cosmetology license holder from another jurisdiction or foreign country to obtain a Texas cosmetology license without repeating cosmetology education or examination license requirements.

(23) [(24)] Manicurist--A manicurist may perform only those services defined in Texas Occupations Code §1602.002(a)(8) and (9).

(24) [(22)] Mini-Salon--A cosmetology establishment in which a person practices cosmetology under a license, certificate or permit issued under this chapter and which consists of a room or suite of rooms that is one of a number of connected establishments in a single premises that open onto a common hallway or common area.

(25) [(23)] Mini-Dual Shop--A shop owned, operated, or managed by a person meeting the requirements of both a mini-barbershop and mini-beauty shop license under Texas Occupations Code §1603.207.

(26) [(24)] Mini-Salon Licensee--A person or entity that holds a license for a mini-salon or mini-dual shop. The mini-salon licensee shall be responsible for rules under Texas Occupations Code, Chapters 1601, 1602, and 1603, and 16 TAC Chapters 82 and 83 for the mini-salon or mini-dual shop.

(27) [(25)] Mobile Shop--A beauty salon, specialty salon, or dual shop that is operated in a self-contained, self-supporting, enclosed mobile unit.

(28) [(26)] Operator--An individual authorized by the department to perform any act or practice of cosmetology under Texas Occupations Code, §1602.002.

(29) [(27)] Preparation--A substance used to beautify a person's face, neck or arms or to temporarily remove superfluous hair from a person's body including but not limited to antiseptics, tonics, lotions, powders, oils, clays, creams, sugars, waxes and/or chemicals.

(30) [(28)] Provisional license--A license that allows a person to practice cosmetology in Texas pending the department's approval or denial of that person's application for licensure by substantial equivalence [reciprocity].

(31) Remote Service Business--A corporation, partnership, sole proprietorship, or other entity that, for compensation, enables a client to schedule a digitally prearranged remote service with a person holding a license, certificate of registration, or permit under Texas Occupations Code, Chapters 1601, 1602, or 1603.

(32) [(29)] Self-Contained--Containing within itself all that is necessary to be able to operate without connecting to outside utilities such as water and electricity.

(33) [(30)] Safety Razor--A razor that is fitted with a guard close to the cutting edge of the razor that is intended to prevent the razor from cutting too deeply and reduces the risk and incidence of accidental cuts.

(34) [(31)] Special Event--Includes weddings, quinceaneras, pageants, proms, debutante balls, birthday parties, religious and cultural ceremonies, and on-stage performances.

(35) [(32)] Specialty Instructor--An individual authorized by the department to perform or offer instruction in an act or practice of cosmetology limited to Texas Occupations Code, §1602.002(a)(2), (4), (5), (6), (7), (8), (9), (10), and (11) [§1602.002(a)(5), (7), (8), and (10)].

(36) [(33)] Specialty Salon or Specialty Shop--A cosmetology establishment in which only the practice of cosmetology as defined in Texas Occupations Code, §1602.002(a)(2), (4), (5), (6), (7), (8), (9), [or] (10), or (11) is performed. Specialty salons may only perform the act or practice of cosmetology in which the salon is licensed.

(37) [(34)] Student Permit--A permit issued by the department to a student enrolled in cosmetology school which states the student's name and the name of the school.

(38) [(35)] Tweezing Technique--Any type of temporary hair removal procedure involving the extraction of hair from the hair follicle by use of, but not limited to, an instrument, appliance or implement made of metal, plastic, or other material.

(39) [(36)] Weaving--The process of attaching, by any method, commercial hair (hair pieces, hair extensions) to a client's hair and/or scalp. Weaving is also known as hair integration or hair intensification.

(40) [(37)] Wet disinfectant soaking container--A container with a cover to prevent contamination of the disinfectant solution and

of a sufficient size such that the objects to be disinfected may be completely immersed in the disinfectant solution.

(41) ~~[(38)]~~ Wig Specialist--A person who holds a wig specialty certificate and who may perform only the practice of cosmetology defined in Texas Occupations Code §1602.002(a)(2).

§83.20. *License Requirements--Individuals.*

(a) To be eligible for an operator license an applicant must:

(1) - (4) (No change.)

(5) have completed the following hours of cosmetology instruction at ~~[curriculum in]~~ a licensed beauty culture school either:

(A) 1,000 ~~[1,500]~~ hours of instruction in a beauty culture school; or

(B) - (C) (No change.)

(6) (No change.)

(b) To be eligible for an esthetician, manicurist, or esthetician/manicurist specialty license an applicant must:

(1) - (4) (No change.)

(5) have completed the following hours of cosmetology instruction at ~~[curriculum in]~~ a licensed beauty culture school:

(A) - (C) (No change.)

(6) (No change.)

(c) - (d) (No change.)

(e) To be eligible for a hair weaving specialty certificate or wig specialty certificate an applicant must:

(1) - (3) (No change.)

(4) have completed the following hours of cosmetology instruction at ~~[curriculum in]~~ a beauty culture school:

(A) - (B) (No change.)

(5) (No change.)

(f) - (g) (No change.)

(h) A license application is valid for one year from the date it is filed with the department.

(i) To operate a remote service business an individual must be licensed to practice cosmetology and must:

(1) in a manner prescribed by the department, notify the department of the intent to operate a remote service business;

(2) provide a permanent mailing address; and

(3) verify that the remote service business complies with the requirements of the Act and this chapter.

(j) The 86th Texas Legislature enacted changes to Chapter 1602, Occupations Code, reducing the number of hours required for a Cosmetology Operator License from 1,500 to 1,000 hours. See House Bill 2847, 86th Legislature, Regular Session (2019), Article 14. The purpose of this transition rule is to provide guidance on how to implement the transition from 1,500 to 1,000 hours.

(1) Beginning January 1, 2020, the department may allow students enrolled on or after January 1, 2020 in a 1,500-hour program to transfer hours towards a 1,000-hour program if the hours meet the required technical standards. A student enrolling in cosmetology school

on or after January 1, 2020 may request to transfer completed hours of a 1,500-hour program towards an approved 1,000-hour program or to transfer to another school.

(2) Upon request of a student enrolled on or after January 1, 2020, the school must apply hours earned towards a 1,000-hour program if the school has an approved 1,000-hour program or allow the student to transfer to another school. This rule expires on December 1, 2020.

§83.21. *License Requirements--Examinations.*

(a) To be eligible for a department examination, an examinee must:

(1) - (2) (No change.)

(3) have completed the number of ~~[curriculum]~~ hours required under this chapter and the Act.

(b) ~~[For an operator license, a student enrolled in a 1,500 hour program is eligible to take the written examination when the department receives proof of the student's completion of 1,000 operator curriculum hours.] A student enrolled in a 1,000-hour [1,000 hour] program is eligible to take the written examination when the department receives proof of the student's completion of 900 operator [curriculum] hours.~~

(c) - (h) (No change.)

§83.22. *License Requirements--Beauty Salons, Specialty Salons, Mini-Salons, Dual Shops, Mini-Dual Shops, Mobile Shops, and Booth Rentals (Independent Contractors).*

(a) - (c) (No change.)

(d) To operate a remote service business, a beauty salon, specialty salon, dual shop, mobile shop, mini salon, or mini-dual shop must:

(1) in a manner prescribed by the department, notify the department of the intent to operate a remote service business;

(2) provide a permanent mailing address; and

(3) verify that the remote service business complies with the requirements of the Act and this chapter.

§83.23. *License Requirements--Beauty Culture Schools.*

(a) - (b) (No change.)

(c) Private beauty culture schools offering instruction for persons seeking a license or certificate must have and maintain the following:

(1) - (3) (No change.)

(4) a copy of the certificate of approval for the curriculum standards approved by the department for each course offered.

(d) Public beauty culture schools must have and maintain the following:

(1) - (2) (No change.)

(3) a copy of the certificate of approval for the curriculum standards approved by the department for each course offered.

(e) (No change.)

§83.25. *License Requirements--Continuing Education.*

(a) - (h) (No change.)

(i) To be approved under Chapter 59 of this title, a provider's course must be dedicated to instruction in one or more of the following topics:

(1) - (2) (No change.)

(3) the curriculum standards ~~[subjects]~~ listed in §83.120.

(j) - (l) (No change.)

§83.28. Substantial Equivalence ~~[Receipt]~~ or Endorsement and Provisional Licensure.

(a) To be granted a license through substantial equivalence ~~[receipt]~~ or endorsement, an applicant must:

(1) - (4) (No change.)

(5) pay the substantial equivalence ~~[receipt]~~ fee and applicable license application fee required under §83.80.

(b) (No change.)

(c) A person issued a license through substantial equivalence ~~[receipt]~~ or endorsement may perform those acts of cosmetology authorized by the license.

(d) (No change.)

(e) The department may issue a provisional license to applicants currently licensed in another jurisdiction who file an application for a Texas cosmetology license by substantial equivalence ~~[receipt]~~.

(f) To be eligible for a provisional license, an applicant must:

(1) file a completed application for a Texas cosmetology license by substantial equivalence ~~[receipt]~~;

(2) - (3) (No change.)

(g) A person issued a provisional license may perform those acts of cosmetology authorized by the provisional certificate or license pending the department's approval or denial of an applicant's license by substantial equivalence ~~[receipt]~~.

(h) A provisional certificate or license is valid until the date the department approves or denies the application for licensure by substantial equivalence ~~[receipt]~~. The department must approve or deny a provisional certificate or license holder's application for a certificate or license by substantial equivalence ~~[receipt]~~ not later than the 180th day after the date the provisional certificate or license is issued.

(i) The department shall issue a certificate or license by substantial equivalence ~~[receipt]~~ to the provisional certificate or license holder if the person is eligible to hold a certificate or license under the Act.

(j) An applicant for licensure by substantial equivalence ~~[receipt]~~ is eligible for a provisional certificate or license only once. A person who is denied licensure by substantial equivalence ~~[receipt]~~ and subsequently reapplies for licensure by substantial equivalence ~~[receipt]~~ is not eligible to obtain additional provisional certificates or licenses to practice cosmetology in Texas.

§83.52. Periodic Inspections.

(a) Except as provided by subsection (b), each ~~[Each]~~ beauty salon, specialty salon, dual shop, mini-salon, or mini-dual shop shall be inspected at least once every four ~~[two]~~ years. Each beauty culture school shall be inspected at least twice per year.

(b) At least once every two years, the department shall inspect specialty shops that hold a license, certificate or permit at which the

practice described in Texas Occupations Code, §§1601.002(1)(E) or (F) or 1602.002(a)(8) or (9) are performed.

(c) ~~[(b)]~~ The beauty salon, specialty salon, or dual shop owner, manager, or their representative must, upon request, make available to the department representative the list required by §83.71(c) of all independent contractors and all mini-salon licensees or mini-dual shop permittees who work in the salon or shop.

(d) ~~[(e)]~~ Upon completion of the inspection, the owner shall be advised in writing of the results. The inspection report will indicate whether the inspection was approved or not approved, and will describe any violations identified during the inspection.

(e) ~~[(d)]~~ For inspections that are not approved, the inspection report will identify violations that must be corrected by the owner. The report will also indicate the corrective modifications required to address the violations, in accordance with §83.54. Additionally, the department may assess administrative penalties and/or administrative sanctions for violations, in accordance with §83.90.

(f) ~~[(e)]~~ Based on the results of the periodic inspection, a cosmetology establishment found out of compliance may be re-inspected.

§83.70. Responsibilities of Individuals.

(a) - (b) (No change.)

(c) A licensee performing digitally prearranged remote services may perform these services at a location other than a licensed facility if the appointment is made through a remote service business's digital network.

(d) ~~[(e)]~~ A licensee who leases space as an independent contractor on the premises of a cosmetology establishment must hold a booth rental permit.

(e) ~~[(d)]~~ Specialty certificate holders may only perform the practice authorized by the specialty certificate.

(f) ~~[(e)]~~ All current licenses may be posted at the licensee's work station in the public view or be made available in a notebook at the salon reception desk.

(g) ~~[(f)]~~ A current photograph of the licensee approximately 1 1/2 inches by 1 1/2 inches shall be attached to the front of the license, certificate or permit.

(h) ~~[(g)]~~ Licensees shall notify the department in writing of any name change within thirty (30) days of the change.

(i) ~~[(h)]~~ Licensees must notify the department within thirty (30) days following any change of address. The department may send all notices on other information required by applicable laws and rules to any licensee's last known mailing address on file with the department.

(j) ~~[(i)]~~ Licensees shall wear clean top and bottom outer garments and footwear while performing services authorized under the Act. Outer garments include tee shirts, blouses, sweaters, dresses, smocks, pants, jeans, shorts, and other similar clothing and do not include lingerie or see-through fabric.

(k) ~~[(j)]~~ Licensees are responsible for compliance with the health and safety standards of this chapter.

§83.72. Responsibilities of Beauty Culture Schools.

(a) - (c) (No change.)

(d) The certificate of curriculum approval ~~[approved curricula]~~ shall be posted in a conspicuous place in the school. A current syllabus and lesson plan for each course shall be maintained by the school and be available for inspection.

(e) Unless the context clearly indicates otherwise, when used in this section the term "student-instructor" shall mean a student permit holder who is enrolled in an instructor course [~~curriculum~~] of a beauty culture school.

(f) Schools must have at least one licensed instructor on duty for each 25 students in attendance, including evening classes. A school may not enroll more than three student-instructors for each licensed instructor teaching in the school. The student-instructor shall at all times work under the direct supervision of the licensed instructor and may not service clients, but will concentrate on teaching skills. A licensed instructor must be physically present during all curriculum standard activities. No credit for instructional hours can be granted to a cosmetology student unless such hours are accrued under the supervision of a licensed instructor.

(g) Schools offering distance education must:

(1) - (2) (No change.)

(3) comply with the curriculum standards [~~requirements~~] in §83.120(d) by limiting distance education to instruction in theory.

(h) - (k) (No change.)

(l) A school must properly account for the [~~credit~~] hours granted to each student. A school shall not engage in any act directly or indirectly that grants or approves student credit that is not accrued in accordance with this chapter. A school must maintain and have available for a department and/or student inspection the following documents for a period of the student's enrollment through 48 months after the student completes the curriculum standards, withdraws, or is terminated:

(1) - (3) (No change.)

(m) - (p) (No change.)

(q) Except for a documented leave of absence, schools shall electronically submit a student's withdrawal or termination to the department within 10 calendar days after the withdrawal or termination. Except for a documented leave of absence, a school shall terminate a student who does not attend class [~~a cosmetology curriculum~~] for 30 consecutive days.

(r) - (u) (No change.)

(v) Schools must ensure that guest presenters possess the necessary knowledge and teaching ability to present a curriculum standard topic and that a licensed instructor is present during the guest presenter's classroom teaching.

(w) Beauty culture schools must have a classroom separated from the laboratory area by walls extending to the ceiling and equipped with the following equipment to properly instruct students enrolled at the school:

(1) - (2) (No change.)

~~[(3) medical dictionary;]~~

(3) ~~[(4)]~~ multi-media [~~audio/visual~~] equipment;

(4) ~~[(5)]~~ a dispensary containing a sink with hot and cold running water and space for storage and dispensing of supplies and equipment;

(5) ~~[(6)]~~ a suitable receptacle for used towels/linens;

(6) ~~[(7)]~~ covered trash cans in lab area; and

(7) ~~[(8)]~~ wet disinfectant soaking container, large enough to fully immerse tools and implements.

(8) ~~[(9)]~~ If offering the operator curriculum standards the following equipment must be available in adequate number for student use:

(A) shampoo bowl and shampoo chair;

(B) hair drying equipment or professional [~~heat processor;~~] hand-held hair dryers [~~dryer, heat cap, or therapeutic light~~];

(C) - (G) (No change.)

~~[(H) professional hand held dryer;]~~

(H) ~~[(H)]~~ manicure table and stool;

(I) ~~[(J)]~~ facial chair or bed;

(J) ~~[(K)]~~ lighted magnifying glass;

(K) ~~[(L)]~~ dry sanitizer; and

(L) ~~[(M)]~~ wet disinfectant soaking containers, large enough to fully immerse tools and implements.

(9) ~~[(10)]~~ If offering the esthetician curriculum standards the following equipment must be available in adequate number for student use:

(A) facial chair or bed;

(B) - (J) (No change.)

~~[(K) facial bed;]~~

(K) ~~[(L)]~~ mannequin head; and

(L) ~~[(M)]~~ wet disinfectant soaking containers, large enough to fully immerse tools and implements.

(10) ~~[(11)]~~ If offering the manicure curriculum standards the following equipment must be available in adequate number for student use:

(A) - (J) (No change.)

(11) ~~[(12)]~~ If offering the esthetician/manicure curriculum standards, the equipment required for the esthetician curriculum standards as listed in paragraph (9) ~~[(10)]~~; and the equipment required for the manicure curriculum standards as listed in paragraph (10) ~~[(11)]~~; including a wax warmer and paraffin warmer for each service, in adequate number for student use.

(12) ~~[(13)]~~ If offering the eyelash extension curriculum standards, the following equipment must be available in adequate number for student use:

(A) - (F) (No change.)

(x) (No change.)

§83.74. *Responsibilities--Withdrawal, Termination, Transfer, School Closure.*

(a) - (g) (No change.)

(h) A student enrolled for a specialty course may withdraw and transfer hours acquired to the operator course not to exceed the amount of hours of that subject in the operator curriculum standards. Students enrolled in the operator course may withdraw and transfer up to the maximum specialty hours within the operator curriculum standards for that course.

§83.77. *Remote Service Business Responsibilities.*

(a) A licensee may not operate a remote service business without first providing notice to the department in accordance with this chapter.



(b) Only licensed individuals may perform digitally prearranged remote services.

(c) A remote service business must comply with the requirements of the Act, this chapter, and all health and safety requirements, as applicable.

(d) A remote service business may not offer a cosmetology service that requires treating or removing a person's hair by:

- (1) coloring;
- (2) processing;
- (3) bleaching;
- (4) dyeing;
- (5) tinting; or
- (6) using a cosmetic preparation.

(e) A remote service business may offer only the following cosmetology services:

(1) haircutting, hairstyling, wigs, artificial hairpieces, or weaving a person's hair by thread and needle or attaching by clamps or glue;

(2) arranging, beautifying, shaving with a safety razor, styling, or trimming a person's mustache or beard;

(3) beautifying a person's face, neck, or arms using, anti-septic, tonic, lotion, powder, oil, clay, or cream;

(4) removing superfluous hair on the face using tweezers;

(5) massaging, cleansing and treating person's hands or feet for polish change manicures and pedicures, and non-whirlpool foot basin pedicures only; and

(6) applying semi-permanent, thread-like extensions composed of single fibers to a person's eyelashes.

(f) A remote service business may not offer portable whirlpool foot spa pedicures.

(g) A licensed individual performing digitally prearranged remote services must practice within the scope of the individual's license and may only provide the services specifically authorized by this section.

(h) A remote service business shall provide through the entity's digital network prior to any digitally prearranged remote service being performed:

(1) the following information regarding the licensee who will perform the service:

(A) the person's first and last name;

(B) the person's license number, certificate of registration, or permit number, as applicable; and

(C) a photograph of the person who will be performing the remote services;

(2) the following information regarding the business:

(A) Internet website address; and

(B) telephone number; and

(3) the department's Internet website address and telephone number and notice that the client may contact the department to file a complaint against the remote service business or licensed individual performing the service.

(i) A remote service business shall maintain records and information showing compliance with this chapter and the Act until at least the fifth anniversary of the date the record was generated.

(j) A licensee who provides a digitally prearranged remote services is responsible for the services provided.

(k) A remote service business shall terminate a licensee's access to the business's digital network if the remote service business or department determine there has been a violation of:

- (1) this chapter; or
- (2) the Act.

(l) Before a licensee provides a digitally prearranged remote service, the remote service business and the licensee must ensure that all implements and supplies have cleaned, disinfected, and sanitized or sterilized department-approved disinfectants and in accordance with the requirements of the Act and this chapter.

(m) A remote service business and licensee performing remote services must ensure compliance with all safety and sanitations requirements related to the digitally prearranged remote services being provided and in accordance with the Act and this chapter.

(n) A remote service business shall maintain accurate records and information showing compliance with this chapter and the Act and must make these records available to the department upon request.

#### §83.80. Fees.

(a) - (b) (No changes.)

(c) Substantial equivalence [Reciprocity] or Endorsement Fee--\$50

(d) - (l) (No change.)

#### §83.120. Technical Requirements--Curriculum Standards.

(a) Operator Curricula.

Figure: 16 TAC §83.120(a)

[Figure: 46 TAC §83.120(a)]

(b) Specialist Curricula.

Figure: 16 TAC §83.120(b)

[Figure: 46 TAC §83.120(b)]

(c) Instructor Curricula.

Figure: 16 TAC §83.120(c) (No change.)

(d) Distance Education.

(1) Schools offering distance education may not designate more than 25% of the total [curriculum] hours in each course as theory hours.

(2) A student may obtain the following distance education [curriculum] hours:

{(A) } [a maximum of 375 hours out of the 1,500 hour operator course;]

(A) [(B)] a maximum of 250 hours out of the 1,000 hour operator course;

(B) [(C)] a maximum of 75 hours out of the 300 hour class A barber to operator course;

(C) [(D)] maximum of 150 hours out of the 600 hour manicure course;

(D) [(E)] a maximum of 188 hours out of the 750 hour esthetician course;

(E) [(F)] a maximum of 300 hours out of the 1200 hour esthetician/manicurist course;

(F) [(G)] a maximum of 80 hours out of the 320 hour eyelash extension course;

(G) [(H)] a maximum of 75 hours out of the 300 hour hairweaving course;

(H) [(I)] a maximum of 188 hours out of the 750 hour instructor course; and

(I) [(J)] a maximum of 125 hours out of the 500 hour instructor course.

(e) Field Trips.

(1) (No change.)

(2) A student may obtain the following field trip [curriculum] hours:

[(A)] a maximum of 75 hours out of the 1,500 hours operator course;

(A) [(B)] a maximum of 50 hours out of the 1,000 hours operator course;

(B) [(C)] a maximum of 30 hours for the manicure course;

(C) [(D)] a maximum of 30 hours for the esthetician course;

(D) [(E)] a maximum of 60 hours for the esthetician/manicurist course;

(E) [(F)] a maximum of 15 hours for the eyelash extension course;

(F) [(G)] a maximum of 30 hours for students taking the 750 hour instructor course; and

(G) [(H)] a maximum of 20 hours for students taking the 500 hour instructor course.

(3) Unless provided by this subsection, field trips are not allowed for specialty courses.

(4) Students must be under the supervision of a licensed instructor from the school where the student is enrolled at all times during the field trip. The instructor-student ratio required in a school is required on a field trip.

(5) Complete documentation is required, including student names, instructor names, activity, location, date, and duration of the activity.

(6) No hours are allowed for travel.

(7) Prior department approval is not required.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 463-8179



## CHAPTER 130. PODIATRIC MEDICINE PROGRAM

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 130, Subchapter D, §§130.42, 130.44, and 130.45; Subchapter E, §§130.53, 130.56, and 130.58; Subchapter F, §130.60; and Subchapter G, §130.72; and new proposed rule Subchapter E, §130.59, regarding the Podiatry Program. These proposed changes are referred to as "proposed rules."

### EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 130, implement Texas Occupations Code, Chapter 202, Podiatrists.

The proposed rules require practitioners to complete a human trafficking training course as required by HB 2059 and the newly-created Chapter 116 of the Occupations Code.

The proposed rules establish limits on prescribing opioids for acute pain, address electronic prescribing, and require continuing education on prescribing and monitoring controlled substances. These rules implement HB 2174, HB 3284, and HB 3285, which revised the Texas Controlled Substances Act in Chapter 481 of the Health and Safety Code.

The proposed rules also clarify the scope of delegation permitted and allow for a podiatrist to delegate to a qualified and properly trained podiatric medical assistant as outlined in HB 2847. Implementing a transfer from the Texas Medical Board to the Department's regulatory authority in HB 2847, the proposed rules provide for the regulation of podiatric medical radiological technicians and establish a fee for this license.

The proposed rules update the administrative penalties and sanctions for podiatrists, implementing HB 1899 and Occupations Code, Chapter 108, as well as penalties for improperly accessing the Texas Prescription Monitoring Program provided for in HB 3284 and the Texas Controlled Substances Act.

Finally, the proposed rules provide for the orderly transition of assessing continuing medical education hours as the Department transitions to biennial podiatric license terms. Biennial license terms were adopted in a previous rulemaking and made effective September 1, 2019, (44 TexReg 4725).

The proposed rules were presented to and discussed by the Podiatric Medical Examiners Advisory Board at its meeting on November 18, 2019. The Advisory Board made the following changes to the proposed rules: removed duplicate comma in §130.53(c). The Advisory Board voted and recommended that the proposed rules with changes be published in the *Texas Register* for public comment.

### SECTION-BY-SECTION SUMMARY

The proposed rules amend §130.42 to require the completion of human trafficking prevention training for each renewal on or after

September 1, 2020. This training is required by Texas Occupations Code §116.003.

The proposed rules amend §130.44 to require two hours of continuing medical education (CME) related to prescribing and monitoring controlled substances prior to the first anniversary of podiatric medical licensure. The amendment requires one hour of CME covering best practices, alternative treatment options, and multimodal approaches to pain management for podiatrists whose practice involves the prescription and dispensation of opioids. Additionally, the amendment revises the CME due date requirements and provides a guide to transition for CME requirements as the Department moves podiatric license renewal to biennial periods.

The proposed rules amend §130.45, by deleting subsection (f), which was duplicative of a similar subsection in §130.44.

The proposed rules amend §130.53, by establishing regulatory authority over podiatric medical radiological technicians as created by HB 2847. The amendment also specifies a requirement of 60 x-rays for student training and requires completion of human trafficking prevention training for each renewal on or after September 1, 2020. The amendment deletes a reference to an act of moral turpitude as grounds for the Department to refuse renewal of a podiatric medical radiology technician license.

The proposed rules amend §130.56 to clarify the scope of delegated authority from a podiatrist to a podiatric medical assistant.

The proposed rules amend §130.58 to permit a podiatrist to designate an agent to communicate prescriptions to a pharmacist. Additionally, the amendment specifies that unauthorized access of the Texas Prescription Monitoring Program (PMP) is grounds for disciplinary action by the Department.

The proposed rules create new §130.59 that outlines the limits on the prescription of opioids to treat acute pain. The new section also requires the electronic prescription of all controlled substance prescriptions after September 1, 2021, and provides a list of exceptions for this requirement.

The proposed rules amend §130.60 to provide the fees applicable for Active Duty Military Members (\$0), and Podiatric Medical Radiological Technicians (\$25).

The proposed rules amend §130.72 to establish grounds for disciplinary actions and sanctions based upon improper access and dissemination of information obtained from the PMP. Additionally, the amendment incorporates denial of licensure, and suspension or revocation of licenses, for offenses identified in Chapter 108, Subchapter B, of the Occupations Code.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules.

The proposed rules will require human trafficking training developed or approved by the Texas Health and Human Service Commission, which will include a free training course option. The proposed rules implement legislation addressing the opioid crisis by adding continuing medical education requirements, e-prescribing, and prescribing limits for opioids. There are no anticipated additional costs to the State associated with the implementation or regulation for these changes.

The proposed rules bring regulation of Podiatric Medical Radiological Technicians fully under the Department's jurisdiction and allow for the Department to establish a fee for Podiatric Medical Radiological Technician registrations. Existing staff will only have a slightly higher workload renewing the registrations and therefore there will be no additional costs to the State.

Mr. Couvillon, has determined that for each year of the first five years the proposed rules are in effect, there is no estimated loss in revenue to the State because the proposed rules do not reduce or remove any fees that would reduce revenue. However, for each of the first five years the proposed rules are in effect there will be an estimated increase in state revenue. The Podiatric Medical Radiological Technician registration fee will result in roughly \$11,000 of revenue annually for the currently 438 Podiatric Medical Radiological Technicians that will be charged \$25.00 each for registration. This fee is less than the \$35.00 fee assessed by the previous agency (Texas State Board of Podiatric Medical Examiners) but currently there is no registration fee assessed by the Department.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, enforcing or administering the proposed rules does not have foreseeable implications relating to costs or revenues of local governments because local governments are not responsible for the regulation of podiatry.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

#### PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be that the proposed rules require certain health care practitioners who provide "direct patient care" to complete a human trafficking training course developed or approved by the Texas Health and Human Services Commission as a condition of license renewal, which will help raise human trafficking awareness to help prevent it. The proposed rules also establish limits on prescribing opioids for acute pain, require that prescriptions for controlled substances be submitted electronically rather than in writing, with certain exceptions, and requires continuing education practitioners related to approved procedures of prescribing and monitoring controlled substances to help end the opioid crisis. The proposed rules allow a podiatrist to delegate to a qualified and properly trained podiatric medical assistant and provides for the regulation of podiatric medical radiological technicians, to better maximize the services provided to patients.

#### PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there will be additional costs to persons who are required to comply with the proposed rules. There will be an annual fee of \$25.00 to the Department for Podiatric Medical Radiological Technicians. The addition of the new fee, which previously was not imposed by the Department due to lack of statutory authority, will result in additional costs for the first five years the proposed rules are in effect.

#### FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Since the agency has determined that the proposed rules will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

#### ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government; however, the proposed rules fall under the exceptions for rules that are necessary to protect the health, safety, and welfare of the residents of this state and are necessary to implement legislation, under §2001.0045(c)(6), (9). Therefore, the agency is not required to take any further action under Government Code §2001.0045.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do require an increase or decrease in fees paid to the agency.
5. The proposed rules do create a new regulation.
6. The proposed rules do expand, limit, or repeal an existing regulation.
7. The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.
8. The proposed rules do not positively or adversely affect this state's economy.

The proposed rules establish an annual \$25.00 fee for Podiatric Medical Radiological Technicians which is necessary for the administration of the program. Additionally, the proposed rules implement statutory provisions to address opioid abuse. The proposed rules also expand possible administrative penalties and sanctions to include misuse of the Prescription Monitoring Program database as required by Texas Occupations Code, Chapter 108.

The proposed rules expand the requirements for renewal of a podiatrist license to include the requirement to complete a human trafficking prevention training and also expand the standards for prescribing controlled substances and dangerous drugs to allow a podiatrist to designate an agent to communicate a prescription to a pharmacist.

#### TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed rules and the proposed rules

do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

#### PUBLIC COMMENTS

Comments on the proposed rules may be submitted to Vanessa Vasquez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: [erule.comments@tdlr.texas.gov](mailto:erule.comments@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

### SUBCHAPTER D. DOCTOR OF PODIATRIC MEDICINE

#### 16 TAC §§130.42, 130.44, 130.45

##### STATUTORY AUTHORITY

The rules are proposed under Texas Occupations Code, Chapters 51 and 202, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The rules are also proposed under Texas Occupations Code, Chapter 108, which establishes the Department's authority to deny, suspend or revoke podiatrists for certain criminal convictions; Texas Occupations Code, Chapter 116, which requires the completion of human trafficking prevention training for health professions licensees; and Texas Health and Safety Code Chapter 481, which mandates certain continuing education for controlled substance prescribers, places limits on the prescription of opioids for acute pain, requires the submission of electronic prescriptions for controlled substances, and forbids unauthorized access to the PMP.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 108, 116, and 202; and Texas Health and Safety Code, Chapter 481.

No other statutes, articles, or codes are affected by the proposed rules.

##### *§130.42. Doctor of Podiatric Medicine License--Term; Renewal.*

(a) A Doctor of Podiatric Medicine license is valid for two years.

(b) To renew a Doctor of Podiatric Medicine license the licensee must:

- (1) submit a department-approved renewal application;
- (2) complete all required continuing medical education hours as required by §130.44; and
- (3) pay the required fee.

(c) For each license renewal on or after September 1, 2020, a Doctor of Podiatric Medicine must complete the human trafficking prevention training required under Occupations Code, Chapter 116, and provide proof of completion as prescribed by the department.

##### *§130.44. Continuing Medical Education--General Requirements.*

(a) Each person licensed to practice podiatric medicine in the State of Texas is required to have 50 hours of continuing medical education (CME) every two years for the renewal of the license to practice podiatric medicine. One hour of training is equal to one hour of CME.

(b) Two hours of the required 50 hours of department approved CME shall be a course, class, seminar, or workshop in: Ethics in the Delivery of Health Care Services and/or Rules and Regulations pertaining to Podiatric Medicine in Texas. Topics on Human Trafficking Prevention, Healthcare Fraud, Professional Boundaries, Practice Risk Management or Podiatric Medicine related Ethics or Jurisprudence courses, Abuse and Misuse of Controlled Substances, Opioid Prescription Practices, and/or Pharmacology, including those sponsored by an entity approved by CPME, APMA, APMA affiliated organizations, AMA, AMA affiliated organizations, or governmental entities, or the entities described in subsections (e) [(e)] and (f) [(d)] are acceptable.

(c) Each person initially licensed to practice podiatric medicine in the State of Texas is required to complete two hours of continuing medical education related to approved procedures of prescribing and monitoring controlled substances prior to the first anniversary of date the license was originally issued.

(d) For each person licensed to practice podiatric medicine in the State of Texas whose practice includes prescription or dispensation of opioids shall annually attend at least one hour of continuing medical education covering best practices, alternative treatment options, and multi-modal approaches to pain management that may include physical therapy, psychotherapy, and other treatments.

(e) [(e)] A licensee shall receive credit for each hour of podiatric medical meetings and training sponsored by APMA, APMA affiliated organizations, TPMA, state, county or regional podiatric medical association podiatric medical meetings, university sponsored podiatric medical meetings, hospital podiatric medical meetings or hospital podiatric medical grand rounds, medical meetings sponsored by the Foot & Ankle Society or the orthopedic community relating to foot care, and others at the discretion of the Board. A practitioner may receive credit for giving a lecture, equal to the credit that a podiatrist attending the lecture obtains.

(f) [(d)] A licensee shall receive credit for each hour of training for non-podiatric medical sponsored meetings that are relative to podiatric medicine and department approved. The department may assign credit for hospital grand rounds, hospital CME programs, corporate sponsored meetings, and meetings sponsored by the American Medical Association, the orthopedic community, the American Diabetes Association, the Nursing Association, the Physical Therapy Association, and others if approved.

(g) [(e)] It shall be the responsibility of the licensee to ensure that all CME hours being claimed meet the standards for CME as set by the commission. Practice management, home study and self-study programs will be accepted for CME credit hours only if the provider is approved by the Council on Podiatric Medical Education. The licensee may obtain up to, but not exceed twenty (20) hours of the aforementioned hours per biennium.

(h) [(f)] Cardiopulmonary Resuscitation (CPR) certification is eligible for up to three (3) hours of CME credit and Advanced Cardiac Life Support (ACLS) certification for up to six (6) hours of CME credit. Practitioners may only receive credit for one, not both. No on-line CPR certification will be accepted for CME credit.

(i) [(g)] If a practitioner has an article published in a peer review journal, the practitioner may receive one (1) hour of CME credit for the article, with credit for the article being provided only once, regardless of the number of times or the number of journals in which the article is published.

(j) [(h)] With the exception of the allowed hours carried forward, the required 50 [These] hours of continuing medical education

must be obtained in a [the] 24-month period immediately preceding the date in [year for] which the license is to be renewed [was issued]. The 24-month [two-year] period will begin on the first full day of the month after the practitioner's date of renewal [November 1] and end [on October 31] two years later. [The year in which the 50-hour credit requirement must be completed after the original license is issued is every odd-numbered year if the original license was issued in an odd-numbered year and is every even-numbered year if the original license was issued in an even-numbered year.] A licensee who completes more than the required 50 hours during the preceding CME period may carry forward a maximum of ten (10) hours for the next renewal CME period.

(k) [(i)] The department shall employ an audit system for continuing education reporting. The license holder shall be responsible for maintaining a record of his or her continuing education experiences. The certificates or other documentation verifying earning of continuing education hours are not to be forwarded to the department at the time of renewal unless the license holder has been selected for audit.

(l) [(j)] The audit process shall be as follows:

(1) The department shall select for audit a random sample of license holders to ensure compliance with CME hours.

(2) If selected for an audit, the license holder shall submit copies of certificates, transcripts or other documentation satisfactory to the department, verifying the license holder's attendance, participation and completion of the continuing education.

(3) Failure to timely furnish this information within thirty (30) calendar days or providing false information during the audit process or the renewal process are grounds for disciplinary action against the license holder.

(4) If selected for continuing education audit during the renewal period, the license holder may renew and pay renewal fees.

(m) [(k)] Licensees that are deficient in CME hours must complete all deficient CME hours and current biennium CME requirement in order to maintain licensure.

(n) [(l)] Continuing education obtained as a part of a disciplinary action is not acceptable credit towards the total of fifty (50) hours required every two years.

(o) The 85th Texas Legislature enacted changes to Chapter 202, Occupations Code, providing the commission with authority to establish a one or two-year license term for Doctors of Podiatric Medicine licensees. See H.B. 3078, 85th Legislature, Regular Session (2017). The purpose of this transition rule is to provide guidance on how continuing medical education will be assessed when transitioning from a one to two-year license term. This rule applies only to licenses renewing on or after September 1, 2019. Beginning September 1, 2019, the department shall stagger the continuing medical education biennium of licenses as follows. Practitioners renewing in an odd-numbered year are to obtain 50 hours of CME for a 24-month period between 2019 and 2021; and for every 2-years thereafter in between renewal dates. Practitioners renewing in an even-numbered year are to obtain 50 hours of CME for a 24-month period between 2020 and 2022; and for every 2-years thereafter in between renewal dates. This rule expires on August 31, 2022.

*§130.45. Continuing Medical Education--Exceptions and Allowances; Approval of Hours.*

(a) Delinquency for continuing education may be allowed in cases of hardship as determined on an individual basis by the executive director. In cases of such hardships, hours of delinquency must be current at the end of a three-year period.

(b) Any practitioner not actively practicing podiatric medicine shall be exempt from these requirements; however, upon resuming practice of podiatric medicine, that person shall fulfill the requirements of the preceding year from the effective date prior to the resumption of practice.

(c) Any program approved by the Council on Podiatric Medical Education of the American Podiatric Medical Association is acceptable to the department.

(d) Hours obtained in Colleges or Universities while working on a degreed or non-degreed program or an approved residency program by the Council on Podiatric Medical Education and providing these courses shall be of a medical nature, shall be considered as having fulfilled the requirements of continuing education hours for the fiscal year.

(e) Hours of continuing education submitted to the department for approval, must be certified by the Continuing Education Director of the institution or organization from which the hours were obtained, that he/she was in actual attendance for the specified period.

~~[(f) Holders of current Cardio-Pulmonary Resuscitation certificates are eligible for three (3) hours credit of continuing education or, current Advance Life Support Course certificates are eligible for six (6) hours credit of continuing education.]~~

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-3671



## SUBCHAPTER E. PRACTITIONER RESPONSIBILITIES AND CODE OF ETHICS

### 16 TAC §§130.53, 130.56, 130.58, 130.59

#### STATUTORY AUTHORITY

The rules are proposed under Texas Occupations Code, Chapters 51 and 202, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The rules are also proposed under Texas Occupations Code, Chapter 108, which establishes the Department's authority to deny, suspend or revoke podiatrists for certain criminal convictions; Texas Occupations Code, Chapter 116, which requires the completion of human trafficking prevention training for health professions licensees; and Texas Health and Safety Code Chapter 481, which mandates certain continuing education for controlled substance prescribers, places limits on the prescription of opioids for acute pain, requires the submission of electronic prescriptions for controlled substances, and forbids unauthorized access to the PMP.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 108, 116, and 202; and Texas Health and Safety Code, Chapter 481.

No other statutes, articles, or codes are affected by the proposed rules.

#### §130.53. Podiatric Medical Radiological Technicians.

(a) This section does not apply to persons certified by the Texas Medical Board under the Medical Radiologic Technologist Certification Act who are Non-Certified Technicians (NCTs), Certified Medical Radiologic Technologists (MRTs) or Limited Medical Radiologic Technologists (LMRTs).

(b) It is the practitioner's responsibility to ensure that all individuals wishing to perform podiatric radiological procedures are properly trained and apply for registration with the department as a podiatric medical radiological technician.

(c) Podiatric equipment training ~~[Training]~~ course providers, and standards for curricula and instructors must be approved by the department ~~[Texas Medical Board]~~.

(d) Podiatric medical radiological technician applicants must:

(1) be 18 years of age or older;

(2) successfully complete the following 20 hours of clinical and didactic training requirements and provide proof of completion to the department:

(A) 5 class hours and 5 out of class hours of radiation safety and protection for the patient, self, and others;

(B) 1 class and 2 out of class hours of radiographic equipment used in podiatric medicine, including safety standards, operation, and maintenance;

(C) 1 class and 4 out of class hours in podiatric radiologic procedures, imaging production and evaluation; and

(D) 1 class and 1 out of class hour in methods of patient care and management essential to radiologic procedures, excluding CPR, BCLS, ACLS and similar subjects; and

(3) submit a department-approved application.

(e) Out of classroom training hours must be verified by a supervising podiatrist and require the student to maintain a log demonstrating the successful production of 60 x-rays in the clinical setting overseen and signed by the supervising podiatrist.

(f) A podiatric medical radiological technician must hold a registration and may perform only podiatric radiological procedures.

(g) A podiatric medical radiological technician registrant shall perform radiological procedures only under the supervision of a practitioner physically present on the premises.

(h) A podiatric medical radiological technician registrant shall not perform any dangerous or hazardous procedures as identified by the Texas Medical Board.

(i) All registrants must comply with the safety rules of the Texas Department of State Health Services, Radiation Control Program relating to the control of radiation.

(j) Registration is valid for one year and must be renewed annually by submitting a department-approved application. For each registration renewal on or after September 1, 2020, a radiological technician must complete the human trafficking prevention training required under Occupations Code, Chapter 116, and provide proof of completion as prescribed by the department.

(k) Registrants shall inform the department of any address change or change of supervising podiatric physician within two (2) weeks.

(l) The department may refuse to issue or renew a registration to an applicant or a podiatric medical radiological technician who:

(1) violates the Podiatric Medical Practice Act, the Rules, an order of the executive director or commission previously entered in a disciplinary proceeding, or an order to comply with a subpoena issued by the department;

(2) violates the Medical Radiologic Technologist Certification Act, or the Rules promulgated by the Texas Medical Board;

(3) violates the Rules of the Texas Department of State Health Services for Control of Radiation;

(4) obtains, attempts to obtain, or uses a registration by bribery or fraud;

(5) engages in unprofessional conduct, including but not limited to, conviction of a crime or ~~[.]~~ commission of any act that is in violation of the laws of the State of Texas if the act is connected with provision of health care~~]; and commission of an act of moral turpitude];~~

(6) develops or has an incapacity that prevents the practice of podiatric medical radiological technician with reasonable skill, competence, and safety to the public as a result of:

(A) an illness;

(B) drug or alcohol dependency; or habitual use of drug or intoxicating liquors; or

(C) another physical or mental condition;

(7) fails to practice in an acceptable manner consistent with public health and welfare;

(8) has disciplinary action taken against a radiological certification, permit, or registration in another state, or by another regulatory agency;

(9) engages in acts requiring registration under these rules without a current registration from the department;

(10) has had a registration revoked, suspended, or has received disciplinary action.

(m) The commission, executive director, or department, as appropriate, may suspend, revoke, or refuse to issue or renew the registration upon finding that a podiatric medical radiological technician has committed any offense listed in this section.

*§130.56. General Authority to Delegate.*

(a) A practitioner may delegate to a qualified and properly trained podiatric medical assistant ~~[person]~~ acting under the podiatrist's appropriate supervision any podiatric medical act that a reasonable and prudent podiatrist would find within the scope of sound medical judgment to delegate if:

(1) in the opinion of the delegating podiatrist, the act:

(A) can be properly and safely performed by the podiatric medical assistant ~~[person]~~ to whom the podiatric medical act is delegated; and

(B) is performed in its customary manner and not in violation of any other statute; and

~~[(C) is not in violation of any other statute; and]~~

(2) the podiatric medical assistant ~~[person]~~ to whom the podiatric medical act is delegated ~~[delegation is made]~~ does not rep-

resent to the public that the podiatric medical assistant ~~[person]~~ is authorized to practice podiatric medicine.

(b) The delegating podiatrist ~~is~~ remains responsible for the podiatric medical acts of the podiatric medical assistant ~~[person]~~ performing the delegated medical acts.

(c) The department may determine whether:

(1) an act constitutes the practice of podiatric medicine; and~~[-]~~

(2) a podiatric medical act may be properly or safely delegated by podiatrists.

*§130.58. Standards for Prescribing Controlled Substances and Dangerous Drugs.*

(a) Podiatrists shall comply with all federal and state laws and regulations relating to the ordering and prescribing of controlled substances in Texas, including but not limited to requirements set forth by the United States Drug Enforcement Administration, United States Food & Drug Administration, Texas Health & Human Services Commission, Texas Department of Public Safety, Texas State Board of Pharmacy, and the department.

(b) A podiatrist may not prescribe a controlled substance except for a valid podiatric medical purpose and in the course of podiatric practice.

(c) A podiatrist may not confer upon and may not delegate prescriptive authority (the act of prescribing or ordering a drug or device) to any other person.

(d) A podiatrist may designate an agent to communicate a prescription to a pharmacist. A podiatrist who designates an agent shall provide a pharmacist on request with a copy of the podiatrist's written authorization for a designated agent to communicate a prescription and shall maintain at the podiatrist's usual place of business a list of the designated agents. The podiatrist remains personally responsible for the actions of the designated agent who communicates a prescription to a pharmacist.

(e) ~~[(d)]~~ Responsible prescribing of controlled substances requires that a podiatrist consider certain elements prior to issuing a prescription, including, but not limited to:

(1) reviewing the patient's Schedule II, III, IV, and V prescription drug history report by accessing the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database;

(2) the patient's date of birth matches with proper identification;

(3) an initial comprehensive history and physical examination is performed;

(4) the Schedule II prescription copy is in the chart or record found for each prescription written; and

(5) alternative therapy (e.g. ultrasound, TENS) discussed and prescribed for the patient.

(f) ~~[(e)]~~ Prior to prescribing opioids, benzodiazepines, barbiturates, or carisoprodol, a podiatrist shall review the patient's Schedule II, III, IV, and V prescription drug history report by accessing the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database. Failure to do so is grounds for disciplinary action by the department.

(g) ~~[(f)]~~ Prior to prescribing any controlled substance, a podiatrist may review the patient's Schedule II, III, IV, and V prescription

drug history report by accessing the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database.

(h) ~~[(g)]~~ An employee of the podiatrist acting at the direction of the podiatrist may perform the function described in subsection (e) and (f) ~~[of this section]~~ so long as that employee acts in compliance with HIPAA and only accesses information related to a particular patient of the podiatrist.

(i) ~~[(h)]~~ A podiatrist or an employee of a podiatrist acting at the direction of the podiatrist may access the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database to inquire about the podiatrist's own Schedule II, III, IV, and V prescription drug activity.

(j) A podiatrist or an employee of a podiatrist acting at the direction of the podiatrist may not access the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database for reasons not directly related to a patient under their care. Unauthorized access is grounds for disciplinary action by the department.

(k) ~~[(i)]~~ If a podiatrist uses an electronic medical records management system (health information exchange) that integrates a patient's Schedule II, III, IV, and V prescription drug history data from the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database, a review of the electronic medical records management system (health information exchange) with the integrated data shall be deemed compliant with the review of the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database as required under §481.0764(a) of the Texas Health and Safety Code and these rules.

(l) ~~[(j)]~~ The duty to access a patient's Schedule II, III, IV, and V prescription drug history report through the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database as described in subsection (e) ~~[of this section]~~ does not apply in the following circumstances: (1) it is clearly noted in the patient's medical record that the patient has a diagnosis of cancer or is in hospice care; or (2) the podiatrist or an employee of the podiatrist makes a good faith attempt to access the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database but is unable to access the information because of circumstances outside the control of the podiatrist or an employee of the podiatrist and the good faith attempt and circumstances are clearly documented in the patient's medical record for prescribing a controlled substance.

(m) ~~[(k)]~~ Information obtained from the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database may be included in any form in the searched patient's medical record and is subject to any applicable state or federal confidentiality, privacy or security laws.

(n) ~~[(l)]~~ In accordance with Texas Health and Safety Code Chapter 483, Subchapter E., a podiatrist may prescribe an opioid antagonist to a person at risk of experiencing an opioid-related drug overdose or to a family member, friend, or other person in a position to assist the person who is at risk of experiencing an opioid-related drug overdose. A podiatrist who prescribes an opioid antagonist shall document the basis for the prescription in the medical record of the person who is at risk of experiencing an opioid-related drug overdose.

§130.59. Opioid Prescription Limits and Required Electronic Prescribing.

(a) In this section, "acute pain" means the normal, predicted, physiological response to a stimulus such as trauma, disease, and operative procedures. Acute pain is time limited and the term does not include:

(1) chronic pain;

(2) pain being treated as part of cancer care;

(3) pain being treated as part of hospice or other end-of-life care; or

(4) pain being treated as part of palliative care.

(b) For the treatment of acute pain, a podiatrist may not:

(1) issue a prescription for an opioid in an amount that exceeds a 10-day supply; or

(2) provide for a refill of an opioid.

(c) The 10-day limit does not apply to a prescription for an opioid approved by the United States Food and Drug Administration for the treatment of substance addiction that is issued by a practitioner for the treatment of substance addiction.

(d) After January 1, 2021, all controlled substances must be prescribed electronically except:

(1) in an emergency or in circumstances in which electronic prescribing is not available due to temporary technological or electronic failure, in a manner provided for by the Texas State Board of Pharmacy rules;

(2) by a practitioner to be dispensed by a pharmacy located outside this state, in a manner provided for by the Texas State Board of Pharmacy rules;

(3) when the prescriber and dispenser are in the same location or under the same license;

(4) in circumstances in which necessary elements are not supported by the most recently implemented national data standard that facilitates electronic prescribing;

(5) for a drug for which the United States Food and Drug Administration requires additional information in the prescription that is not possible with electronic prescribing;

(6) for a non-patient-specific prescription pursuant to a standing order, approved protocol for drug therapy, collaborative drug management, or comprehensive medication management, in response to a public health emergency or in other circumstances in which the practitioner may issue a non-patient-specific prescription;

(7) for a drug under a research protocol;

(8) by a practitioner who has received a waiver under Section 481.0756 of the Texas Health and Safety Code from the requirement to use electronic prescribing; or

(9) under circumstances in which the practitioner has the present ability to submit an electronic prescription but reasonably determines that it would be impractical for the patient to obtain the drugs prescribed under the electronic prescription in a timely manner and that a delay would adversely impact the patient's medical condition.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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## SUBCHAPTER F. FEES

### 16 TAC §130.60

#### STATUTORY AUTHORITY

The rules are proposed under Texas Occupations Code, Chapters 51 and 202, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The rules are also proposed under Texas Occupations Code, Chapter 108, which establishes the Department's authority to deny, suspend or revoke podiatrists for certain criminal convictions; Texas Occupations Code, Chapter 116, which requires the completion of human trafficking prevention training for health professions licensees; and Texas Health and Safety Code Chapter 481, which mandates certain continuing education for controlled substance prescribers, places limits on the prescription of opioids for acute pain, requires the submission of electronic prescriptions for controlled substances, and forbids unauthorized access to the PMP.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 108, 116, and 202; and Texas Health and Safety Code, Chapter 481.

No other statutes, articles, or codes are affected by the proposed rules.

#### *§130.60. Fees.*

(a) Fees paid to the department are non-refundable.

(b) Fees are as follows:

(1) Temporary Residency License (Initial and Renewal)--  
\$125

(2) Extended Temporary License extension--\$50

(3) Provisional License--\$125

(4) Doctor of Podiatric Medicine Initial License--\$750

(5) Doctor of Podiatric Medicine Renewal License--\$700

(6) Voluntary Charity Care Status License (Initial and Renewal)--\$0

(7) Active Duty Military Members--\$0

(8) [(7)] Hyperbaric Oxygen Certificate--\$25

(9) [(8)] Nitrous Oxide Registration--\$25

(10) [(9)] Podiatric Medical Radiological Technicians--\$25 [\$0]

(11) [(10)] Duplicate License/replacement license--\$25

(12) [(11)] The fee for a criminal history evaluation letter is the fee prescribed under §60.42 [of this title] (relating to Criminal History Evaluation Letters).

(13) [(12)] A dishonored/returned check or payment fee is the fee prescribed under §60.82 [of this title] (relating to Dishonored Payment Device).

(14) [(13)] Late renewal fees for licenses issued under this chapter are provided under §60.83 [of this title] (relating to Late Renewal Fees).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 463-3671



## SUBCHAPTER G. ENFORCEMENT

### 16 TAC §130.72

#### STATUTORY AUTHORITY

The rules are proposed under Texas Occupations Code, Chapters 51 and 202, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The rules are also proposed under Texas Occupations Code, Chapter 108, which establishes the Department's authority to deny, suspend or revoke podiatrists for certain criminal convictions; Texas Occupations Code, Chapter 116, which requires the completion of human trafficking prevention training for health professions licensees; and Texas Health and Safety Code Chapter 481, which mandates certain continuing education for controlled substance prescribers, places limits on the prescription of opioids for acute pain, requires the submission of electronic prescriptions for controlled substances, and forbids unauthorized access to the PMP.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 108, 116, and 202; and Texas Health and Safety Code, Chapter 481.

No other statutes, articles, or codes are affected by the proposed rules.

#### *§130.72. Administrative Penalties and Sanctions.*

(a) If a person or entity violates any provision of Texas Occupations Code, Chapters 51 or 202, this chapter, or any rule or order of the executive director or commission, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both in accordance with the provisions of Texas Occupations Code, Chapters 51 and 202, any associated rules, and consistent with the department's enforcement plan.

(b) A person authorized to receive information by accessing the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database may not disclose or use the information in a manner not authorized by law.

(c) A person authorized to receive information by accessing the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database commits an offense if the person discloses or uses the information in a manner not authorized by law.

(d) A person authorized to receive information by accessing the Texas State Board of Pharmacy's - Texas Prescription Monitoring Program (PMP) database commits an offense if the person makes a material misrepresentation or fails to disclose a material fact in the request for information.

(e) The department shall deny an application for license, and shall revoke the license of a person licensed under Chapter 202, Texas Occupations Code, as required by Chapter 108, Subchapter B, Texas Occupations Code.

(f) A person whose application for licensure has been denied, or whose license has been revoked, pursuant to Texas Occupations Code, Chapter 108, Subchapter B may reapply or seek reinstatement as provided by that subchapter.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Brad Bowman

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## **TITLE 19. EDUCATION**

### **PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION**

#### **CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION**

The State Board for Educator Certification (SBEC) proposes amendments to §§230.21, 230.33, 230.36, 230.55, 230.104, and 230.105, concerning professional educator preparation and certification. The proposed amendments would implement the statutory requirements of Senate Bill (SB) 1839 and House Bills (HBs) 2039 and 3349, 85th Texas Legislature, Regular Session, 2017, and HB 3, 86th Texas Legislature, 2019. The proposed amendment to Subchapter C, Assessment of Educators, would reduce the amount of time for computer- and paper-based examination retakes from 45 to 30 days and would update the figure specifying the required test for issuance of the standard certification, including the removal of the master teacher certification class and the Principal: Early Childhood-Grade 12 certificate and the addition of Early Childhood-Grade 3 (EC-3), Science of Teaching Reading, and Trade and Industrial Workforce Training. The proposed amendment to Subchapter D, Types and Classes of Certificates Issued, would require the English as a Second Language Supplemental assessment for issuance of an intern certificate obtained through the intensive pre-service route. The proposed amendment to Subchapter E, Educational Aide Certificate, would allow the Educational Aide I certificate to be

issued to high school students who have completed certain career and technical education courses. Proposed changes to Subchapter G, Certificate Issuance Procedures, would clarify that requests for certificate corrections be submitted to the Texas Education Agency (TEA) within six weeks from the original date of issuance. The proposed changes would also implement the requirement specified in statute that certified classroom teachers must complete training prior to receiving test approval for the Early Childhood: Prekindergarten-Grade 3 certificate.

**BACKGROUND INFORMATION AND JUSTIFICATION:** The SBEC rules in 19 Texas Administrative Code (TAC) Chapter 230 specify the testing requirements for certification and the additional certificates based on examination. These requirements ensure that educators are qualified and professionally prepared to instruct the schoolchildren of Texas. The following provides a description of changes to Chapter 230, Subchapters C, D, E, and G.

#### *Subchapter C, §230.21. Assessment of Educators*

The proposed amendment to §230.21(a)(1)(D) would reduce the amount of time between computer- and paper-based retakes from 45 days to 30 days. The proposed amendment is in response to stakeholder feedback from the July 2019 SBEC meeting and would allow candidates an additional testing window in the summer to meet certification requirements.

The proposed amendment to §230.21(e) would amend Figure: 19 TAC §230.21(e) to comply with HB 3 by removing all master teacher certificates from the current list of active certifications and by requiring educators that teach any grade level from Prekindergarten-Grade 6 to demonstrate proficiency in the science of teaching reading on a certification examination beginning January 1, 2021. The amendment would add 293 Science of Teaching Reading TExES as a required content pedagogy test for the following certifications: §233.2, Core Subjects: Early Childhood-Grade 6; §233.2, Core Subjects: Grades 4-8; §233.2, Early Childhood: Prekindergarten-Grade 3; §233.3, English Language Arts and Reading: Grades 4-8; §233.3, English Language Arts and Reading/Social Studies: Grades 4-8.

Additionally, the proposed amendment to §230.21(e) would amend Figure: 19 TAC §230.21(e) to remove §241.60, Principal: Early Childhood-Grade 12, as new principal certifications were created, effective December 23, 2018; and to provide for a transition from the current content tests to the anticipated content pedagogy tests as follows:

Figure: Preamble

The proposed amendment to §230.21(e) would also amend Figure: 19 TAC §230.21(e) to phase out retired assessments by removing the retired 183 Braille TExES assessment for the §233.8, Teacher of Students with Visual Impairments Supplemental: Early Childhood-Grade 12 certification; comply with SB 1839 and HB 2039 to create the required assessments for the §233.2 Early Childhood: Prekindergarten-Grade 3 certification; and to comply with HB 3349 to create the required assessments for the new §233.14 Trade and Industrial Workforce Training: Grades 6-12 certification.

#### *Subchapter D, §230.33, Classes of Certificates, and §230.36, Intern Certificates*

The proposed amendment to §230.33(b)(5) would align with the mandate in HB 3 to repeal the master teacher certificate class, giving those certificates contained therein a "legacy" designation for educator assignment purposes until they expire.

The proposed amendment to §230.36(f)(2)(C) would add the requirement of the English as Second Language (ESL) Supplemental assessment for issuance of the intern certificate through the intensive pre-service route. This will ensure that teachers are ready to serve students in their classroom.

*Subchapter E, §230.55. Certification Requirements for Educational Aide I*

TEA staff in the divisions of Educator Certification, Instructional Support, and Career and Technical Education are working collaboratively to support the work associated with industry-based certifications. Industry certifications were designed to prepare students for success in postsecondary endeavors and are used for public school accountability.

The proposed amendment to §230.55 would add the word "either" to provide two possible paths to qualifying for an Educational Aide I certificate: a path for conventional high school graduates and an alternate path for high school students 18 years of age or older to attain educational industry experience while still in school. The alternate path to certification in proposed new §230.55(3) and (4) would allow students to earn Educational Aide I credentials after completing career and technical education courses and would allow schools to accurately reflect these students as "career ready" in their accountability measures.

*Subchapter G, §230.104. Correcting a Certificate or Permit Issued in Error and §230.105. Issuance of Additional Certificates Based on Examination*

The proposed amendment to §230.104(b) would add the requirement that if an entity incorrectly issues a certificate, TEA must receive a request to correct the error from the entity within six weeks. The proposed change also requires that educators inform the recommending educator preparation program (EPP) of any assignment change that would require the educator to be certified in a different certification area. This will ensure that teachers are teaching in their correct assignments. The proposed amendment would also apply to supplemental certifications, such as the Early Childhood-Grade 12 ESL certification, to ensure candidates are prepared to teach the students they serve.

The proposed amendment to §230.105(3) would comply with SB 1839 and HB 2039 to mandate that all candidates complete training requirements for issuance of an Early Childhood: Prekindergarten-Grade 3 certification. Remaining paragraphs would be renumbered.

**FISCAL IMPACT:** Ryan Franklin, associate commissioner for educator leadership and quality, has determined that there is an anticipated fiscal impact on state government (TEA) required to comply with the proposal. The TEA estimates a cost of \$128,909 for each of the next five fiscal years (FYs) from FYs 2020-2024 for the development and ongoing administrative costs needed to maintain assessments. The TEA will receive an \$11 remittance for each Science of Teaching Reading test taken for an estimated total of \$214,522 for FY 2020 and \$321,783 for FYs 2021-2024. The TEA will receive \$17 per Educational Aide I application; this fee will be offset by the cost to process the certification. The TEA anticipates 4,872 additional Educational Aide I certifications for an estimated total of \$82,824 for FYs 2020-2024. There may be an anticipated fiscal impact on local government if a school district chooses to pay the \$17 Educational Aide I application fee. Assuming districts pay for each application, the total cost would be \$82,824 for each year of FYs 2020-2024. There is currently

state funding set aside to reimburse local educational agencies for fees paid for by industry-based certifications.

**LOCAL EMPLOYMENT IMPACT:** The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

**SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT:** The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code (TGC), §2006.002, is required.

**COST INCREASE TO REGULATED PERSONS:** The proposal does impose a cost on regulated persons, another state agency, a special district, or a local government, and, therefore, is subject to TGC, §2001.0045. However, the proposal is exempt from TGC, §2001.0045, as provided under that statute, because the proposal is necessary to implement legislation. In addition, the proposal is necessary to ensure that certified Texas educators are competent to educate Texas students and, therefore, necessary to protect the safety and welfare of the residents of this state.

**TAKINGS IMPACT ASSESSMENT:** The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under TGC, §2007.043.

**GOVERNMENT GROWTH IMPACT:** The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would expand an existing regulation in 19 TAC §230.55 by allowing the SBEC to issue an Educational Aide I certificate to high school students seeking industry-based credentials. The proposed amendment to §230.105 would expand an existing regulation by adding the Early Childhood: Prekindergarten-Grade 3 certification as an ineligible certification for certification by examination. The proposed rulemaking would limit an existing regulation, §230.21(a)(1)(D), by reducing the number of days between computer- and paper-based examination retakes from 45 to 30 days. The proposed rulemaking would require an increase in fees paid to the agency for each Science of Teaching Reading assessment taken (\$11 per assessment), but those fees would be offset by the increased costs to the agency of developing and administering the new test. The proposed rulemaking would require an increase in fees paid to the agency for each additional Educational Aide I certificate issued, but those fees would be offset by the cost to process the certification. The proposed rulemaking would create a new regulation in §230.104 by requiring that entities notify the agency within six weeks of certificate issuance for purposes of correction to an intern or probationary certificate and educators to notify their EPPs when their assignments change in a way that could impact the legal appropriateness of their certification. The proposed rulemaking would repeal an existing regulation as it eliminates the former principal certification and the master teacher class of certifications to implement HB 3, 86th Texas Legislature, 2019.

The proposed rulemaking would not create or eliminate a program, would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require a decrease in fees paid to the agency; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

**PUBLIC BENEFIT AND COST TO PERSONS:** Mr. Franklin has determined that for each year of the first five years the proposal is in effect, the public and student benefit anticipated as a result of the proposed amendments would help broaden the pool of potential educators in Texas by expanding the Educational Aide I certificate and ensure that educator candidates are demonstrating proficiency in research-based reading strategies and on rigorous and relevant assessments.

Future teacher candidates seeking certification in Early Childhood: Prekindergarten-Grade 3, Core Subjects: Early Childhood-Grade 6, Core Subjects: Grades 4-8, English Language Arts and Reading: Grades 4-8 and English Language Arts and Reading/Social Studies: Grades 4-8 will be required to take the Science of Teaching Reading assessment. Based on 2017-2018 data, TEA staff anticipates this will impact about 29,253 test attempts with the cost of each test being \$136 for a total of \$3,978,408 starting FY 2020. Future candidates seeking certification in School Counselor will be required to take a certification assessment that has both selected-response and constructed-response questions. Based on the 2017-2018 data, TEA staff anticipates this impact to be about 1,633 test attempts with the cost of each test increasing from \$116 to \$200 for a total of \$137,172 starting FY 2021. Future candidates seeking certification in Educational Diagnostician will be required to take a certification assessment that has both selected-response and constructed-response questions. Based on the 2017-2018 data, TEA staff anticipates this impact to be about 625 test attempts with the cost of each test increasing from \$116 to \$200 for a total of \$52,500 starting FY 2020. Future teacher candidates for Trade and Industrial Education 6-12 and Early Childhood-12 Physical Education will be required to take a certification assessment that has both selected-response and constructed-response questions. Based on the 2017-2018 data, TEA staff anticipates this impact to be about 3,895 test attempts with the cost of each test increasing from \$116 to \$136 for a total of \$77,900 starting FY 2021. Future teacher candidates for English Language Arts and Reading: Grades 4-8 will be required to take a certification assessment that has both selected-response and constructed-response questions. Based on the 2017-2018 data, TEA staff anticipates this impact to be about 2,556 test attempts with the cost of each test increasing from \$116 to \$136 for a total of \$51,120 starting FY 2021. Based on 2018-2019 Public Education Information Management System (PEIMS) data, the anticipated number of candidates that would meet the new educational aide requirements would be 4,872. Each application would cost \$17 for a total of \$82,824 per FY starting FY 2020.

**DATA AND REPORTING IMPACT:** The proposal would have no new data and reporting impact.

**PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS:** The TEA staff has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

**PUBLIC COMMENTS:** The public comment period on the proposal begins January 3, 2020 and ends February 3, 2020. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/SBEC\\_Rules\\_\(TAC\)/Proposed\\_State\\_Board\\_for\\_Educator\\_Certification\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/). The SBEC will take registered oral and written comments on the proposal at the February 21, 2020 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act

must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on January 3, 2019.

## **SUBCHAPTER C. ASSESSMENT OF EDUCATORS**

### **19 TAC §230.21**

**STATUTORY AUTHORITY.** The amendment is proposed under Texas Education Code (TEC) §21.041(b)(1), (2), and (4), which requires the State Board for Educator Certification (SBEC) to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; TEC, §21.044(a) as amended by Senate Bills (SB) 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to propose rules establishing training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program; TEC, §21.048, as amended by House Bill (HB) 3, 86th Texas Legislature, 2019, which states that the SBEC shall propose rules prescribing comprehensive examinations for each class of certificate issued by the board that includes not requiring more than 45 days elapsing between examination retakes and that starting January 1, 2021, all candidates teaching prekindergarten through grade six must demonstrate proficiency in the science of teaching reading on a certification examination; TEC, §21.050(a), which states that a person who applies for a teaching certificate must possess a bachelor's degree; TEC, §21.050(b), as amended by House Bill (HB) 3217, 86th Texas Legislature, 2019, which states that the SBEC shall provide for a minimum number of semester credit hours for field-based experience or internship; TEC, §21.050(c), which states that a person who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate; TEC, §21.051, as amended by Senate Bill 1839, 85th Texas Legislature, Regular Session, 2017, which provides a requirement that before a school may employ a certification candidate as a teacher of record, the candidate must have completed at least 15 hours of field-based experience in which the candidate was actively engaged at an approved school in instructional or educational activities under supervision; TEC, §22.064, as amended by HB 3, 86th Texas Legislature, 2019, which requires the SBEC to designate all Master Teacher certificates as Legacy Master Teacher; TEC, §22.082, which requires SBEC to subscribe to the criminal history clearinghouse as provided by Texas Government Code, §411.0845, and may obtain any law enforcement or criminal history records that relate to a specific applicant for or holder of a certificate issued under TEC, Chapter 21, Subchapter B; and Texas Occupations Code, §54.003, which states that a licensing authority shall provide accommodations and eligibility criteria for examinees diagnosed as having dyslexia.

**CROSS REFERENCE TO STATUTE.** The amendment implements Texas Education Code (TEC), §§21.041(b)(1), (2), and

(4); 21.044(a), as amended by Senate Bills (SB) 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017; 21.048, as amended by HB 3, 86th Texas Legislature, 2019; 21.050(a); 21.050(b), as amended by House Bill (HB) 3217, 86th Texas Legislature, 2019; 21.050(c); 21.051, as amended by SB 1839, 85th Texas Legislature, Regular Session, 2017; 22.064, as amended by HB 3, 86th Texas Legislature, 2019; 22.082; and Texas Occupation Code, §54.003.

*§230.21. Educator Assessment.*

(a) A candidate seeking certification as an educator must pass the examination(s) required by the Texas Education Code (TEC), §21.048, and the State Board for Educator Certification (SBEC) in §233.1(e) of this title (relating to General Authority) and shall not retake an examination more than four times, unless the limitation is waived for good cause. The burden of proof shall be upon the candidate to demonstrate good cause.

(1) For the purposes of the retake limitation described by the TEC, §21.048, an examination retake is defined as a second or subsequent attempt to pass any examination required for the issuance of a certificate, including an individual core subject examination that is part of the overall examination required for the issuance of a Core Subjects certificate as described in §233.2 of this title (relating to Early Childhood; Core Subjects).

(A) A canceled examination score is not considered an examination retake.

(B) An examination taken by an educator during a pilot period is not considered part of an educator's five-time test attempt limit.

(C) Pursuant to TEC, §21.0491(d), the limit on number of test attempts does not apply to the trade and industrial workforce training certificate examination prescribed by the SBEC.

(D) A candidate who fails a computer- or paper-based examination cannot retake the examination before 30 [45] days have elapsed following the candidate's last attempt to pass the examination.

(2) Good cause is:

(A) the candidate's highest score on an examination is within one conditional standard error of measurement (CSEM) of passing, and the candidate has completed 50 clock-hours of educational activities. CSEMs will be published annually on the Texas Education Agency (TEA) website;

(B) the candidate's highest score on an examination is within two CSEMs of passing, and the candidate has completed 100 clock-hours of educational activities;

(C) the candidate's highest score on an examination is within three CSEMs of passing, and the candidate has completed 150 clock-hours of educational activities;

(D) the candidate's highest score on an examination is not within three CSEMs of passing, and the candidate has completed 200 clock-hours of educational activities;

(E) if the candidate needs a waiver for more than one of the individual core subject examinations that are part of the overall examination required for the issuance of a Core Subjects certificate, the candidate has completed the number of clock-hours of educational activities required for each individual core subject examination as described in subparagraphs (A)-(D) of this paragraph up to a maximum of 300 clock-hours. The number of clock-hours for each examination may be divided equally based on the number of examinations in the

waiver request, but the number of clock-hours for an examination shall not be less than 50; or

(F) if a CSEM is not appropriate for an examination, the TEA staff will identify individuals who are familiar and knowledgeable with the examination content to review the candidate's performance on the five most recent examinations, identify the deficit competency or competencies, and determine the number of clock-hours of educational activities required.

(3) Educational activities are defined as:

(A) institutes, workshops, seminars, conferences, interactive distance learning, video conferencing, online activities, undergraduate courses, graduate courses, training programs, in-service, or staff development given by an approved continuing professional education provider or sponsor, pursuant to §232.17 of this title (relating to Pre-Approved Professional Education Provider or Sponsor) and §232.19 of this title (relating to Approval of Private Companies, Private Entities, and Individuals), or an approved educator preparation program (EPP), pursuant to §228.10 of this title (relating to Approval Process); and

(B) being directly related to the knowledge and skills included in the certification examination competency or competencies in which the candidate answered less than 70 percent of competency questions correctly. The formula for identifying a deficit competency is the combined total of correct answers for each competency on the five most recent examinations divided by the combined total of questions for each competency on the five most recent examinations.

(4) Documentation of educational activities that a candidate must submit includes:

(A) the provider, sponsor, or program's name, address, telephone number, and email address. The TEA staff may contact the provider, sponsor, or program to verify an educational activity;

(B) the name of the educational activity (e.g., course title, course number);

(C) the competency or competencies addressed by the educational activity as determined by the formula described in paragraph (3)(B) of this subsection;

(D) the provider, sponsor, or program's description of the educational activity (e.g., syllabus, course outline, program of study); and

(E) the provider, sponsor, or program's written verification of the candidate's completion of the educational activity (e.g., transcript, certificate of completion). The written verification must include:

(i) the provider, sponsor, or program's name;

(ii) the candidate's name;

(iii) the name of the educational activity;

(iv) the date(s) of the educational activity; and

(v) the number of clock-hours completed for the educational activity. Clock-hours completed before the most recent examination attempt or after a request for a waiver is submitted shall not be included. One semester credit hour earned at an accredited institution of higher education is equivalent to 15 clock-hours.

(5) To request a waiver of the limitation, a candidate must meet the following conditions:

(A) the candidate is otherwise eligible to take an examination. A candidate seeking a certificate based on completion of an EPP must have the approval of an EPP to request a waiver;

(B) beginning September 1, 2016, the candidate pays the non-refundable waiver request fee of \$160;

(C) the candidate requests the waiver of the limitation in writing on forms developed by the TEA staff; and

(D) the request for the waiver is postmarked not earlier than:

(i) 45 calendar days after an unsuccessful attempt at the fourth retake of an examination as defined in the TEC, §21.048; or

(ii) 90 calendar days after the date of the most recent denied waiver of the limitation request; or

(iii) 180 calendar days after the date of the most recent unsuccessful examination attempt that was the result of the most recently approved request for waiver of the limitation.

(6) The TEA staff shall administratively approve each application that meets the criteria specified in paragraphs (2)-(5) of this subsection.

(7) An applicant who does not meet the criteria in paragraphs (2)-(5) of this subsection may appeal to the SBEC for a final determination of good cause. A determination by the SBEC is final and may not be appealed.

(b) A candidate seeking a standard certificate as an educator based on completion of an approved EPP may take the appropriate certification examination(s) required by subsection (a) of this section only at such time as the EPP determines the candidate's readiness to take the examinations, or upon successful completion of the EPP, whichever comes first.

(c) The holder of a lifetime Texas certificate effective before February 1, 1986, must pass examinations prescribed by the SBEC to be eligible for continued certification, unless the individual has passed the Texas Examination of Current Administrators and Teachers (TECAT).

(d) The commissioner of education approves the satisfactory level of performance required for certification examinations, and the SBEC approves a schedule of examination fees and a plan for administering the examinations.

(e) The appropriate examination(s) required for certification are specified in the figure provided in this subsection.

Figure: 19 TAC §230.21(e)

[Figure: 49 TAC §230.21(e)]

(f) Scores from examinations required under this title must be made available to the examinee, the TEA staff, and, if appropriate, the EPP from which the examinee will seek a recommendation for certification.

(g) The following provisions concern ethical obligations relating to examinations.

(1) An educator or candidate who participates in the development, design, construction, review, field testing, scoring, or validation of an examination shall not reveal or cause to be revealed the contents of the examination to any other person.

(2) An educator or candidate who administers an examination shall not:

(A) allow or cause an unauthorized person to view any part of the examination;

(B) copy, reproduce, or cause to be copied or reproduced any part of the examination;

(C) reveal or cause to be revealed the contents of the examination;

(D) correct, alter, or cause to be corrected or altered any response to a test item contained in the examination;

(E) provide assistance with any response to a test item contained in the examination or cause assistance to be provided; or

(F) deviate from the rules governing administration of the examination.

(3) An educator or candidate who is an examinee shall not:

(A) copy, reproduce, or cause to be copied or reproduced any test item contained in the examination;

(B) provide assistance with any response to a test item contained in the examination, or cause assistance to be provided;

(C) solicit or accept assistance with any response to a test item contained in the examination;

(D) deviate from the rules governing administration of the examination; or

(E) otherwise engage in conduct that amounts to cheating, deception, or fraud.

(4) An educator, candidate, or other test taker shall not:

(A) solicit information about the contents of test items on an examination that the educator, candidate, or other test taker has not already taken from an individual who has had access to those items, or offer information about the contents of specific test items on an examination to individuals who have not yet taken the examination;

(B) fail to pay all test costs and fees as required by this chapter or the testing vendor; or

(C) otherwise engage in conduct that amounts to violations of test security or confidentiality integrity, including cheating, deception, or fraud.

(5) A person who violates this subsection is subject to:

(A) sanction, including, but not limited to, disallowance and exclusion from future examinations either in perpetuity or for a period of time that serves the best interests of the education profession, in accordance with the provisions of the TEC, §21.041(b)(7), and Chapter 249 of this title (relating to Disciplinary Proceedings, Sanctions, and Contested Cases); and/or

(B) denial of certification in accordance with the provisions of the TEC, §21.041(b)(7), and Chapter 249 of this title; and/or

(C) voiding of a score from an examination in which a violation specified in this subsection occurred as well as a loss of a test attempt for purposes of the retake limit in subsection (a) of this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

TRD-201904883



## SUBCHAPTER D. TYPES AND CLASSES OF CERTIFICATES ISSUED

### 19 TAC §230.33, §230.36

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC) §21.003(a); which states that a person may not be employed as a teacher, teacher intern or teacher trainee, librarian, educational aide, administrator, educational diagnostician, or school counselor by a school district unless the person holds an appropriate certificate or permit issued as provided by the TEC, Chapter 21, Subchapter B; TEC, §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; TEC, §21.031(b), which states that the SBEC shall ensure that all candidates for certification or renewal of certification should demonstrate the knowledge and skills necessary to improve the performance of a diverse student population; TEC, §21.041(b)(1)-(5), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid; requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; and requires the SBEC to propose rules that include requirements for educators that hold a similar certification issued by another state or foreign country; TEC, §21.041(b)(9), which requires the SBEC to propose rules for the regulation of continuing education requirements; TEC, §21.051, as amended by Senate Bill 1839, 85th Texas Legislature, Regular Session, 2017, which provides a requirement that before a school may employ a certification candidate as a teacher of record, the candidate must have completed at least 15 hours of field-based experience in which the candidate was actively engaged at an approved school in instructional or educational activities under supervision; TEC, §22.064, as amended by House Bill, 86th Texas Legislature, 2019, which requires the SBEC to designate all Master Teacher certificates as Legacy Master Teacher; TEC, §22.0831(c), which requires SBEC to review the national criminal history of a person seeking certification; and TEC, §22.0831(f)(1) and (2), which state that SBEC may propose rules regarding the deadline for the national criminal history check and implement sanctions for persons failing to comply with the requirements.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§21.003(a); 21.031(a); 21.031(b); 21.041(b)(1)-(5) and (9); 21.051, as amended by Senate Bill 1839, 85th Texas Legislature, Regular Session, 2017; 22.064, as amended by House Bill, 86th Texas Legislature, 2019; 22.0831(c); and TEC, §22.0831(f)(1) and (2).

§230.33. *Classes of Certificates.*

(a) "Class of certificates" means a certificate with the following characteristics:

- (1) specific job duties or functions associated with the certificate;
- (2) standards established by the State Board for Educator Certification (SBEC) for the issuance of the certificate; and
- (3) comprehensive examination(s) prescribed by the SBEC, as specified in §230.21 of this title (relating to Educator Assessment).

(b) Classes of certificates include the following:

- (1) superintendent;
- (2) principal;
- (3) classroom teacher (categories of classroom teaching certificates are described in Chapter 233 of this title (relating to Categories of Classroom Teaching Certificates));
- (4) reading specialist;
- (5) legacy master teacher [master teacher];
- (6) school librarian;
- (7) school counselor; and
- (8) educational diagnostician.

§230.36. *Intern Certificates.*

(a) General provisions.

(1) Certificate classes. An intern certificate may be issued for any class of certificate except educational aide.

(2) Requirement to hold an intern certificate. A candidate seeking certification as an educator must hold an intern certificate while participating in an internship through an approved educator preparation program (EPP).

(b) Requirements for issuance. An intern certificate may be issued to a candidate seeking certification as an educator who meets the conditions and requirements prescribed in this subsection.

(1) Bachelor's degree. Except as otherwise provided in rules of the State Board for Educator Certification related to certain career and technical education certificates based on skill and experience, the candidate must hold a bachelor's degree or higher from an accredited institution of higher education. An individual who has earned a degree outside the United States must provide an original, detailed report or course-by-course evaluation for all college-level credits prepared by a foreign credential evaluation service recognized by the Texas Education Agency (TEA). The evaluation must verify that the individual holds, at a minimum, the equivalent of a bachelor's degree issued by an accredited institution of higher education in the United States.

(2) General certification requirements. The candidate must meet the general certification requirements prescribed in §230.11 of this title (relating to General Requirements).

(3) Fee. The candidate must pay the fee prescribed in §230.101 of this title (relating to Schedule of Fees for Certification Services).

(4) Fingerprints. The candidate must submit fingerprints in accordance with §232.35(c) of this title (relating to Submission of Required Information) and the Texas Education Code (TEC), §22.0831.

(c) Conditions. The validity and effectiveness of an intern certificate is subject to the following conditions.

(1) Internship. The holder of an intern certificate must be a participant in good standing of an approved Texas EPP, serving in an acceptable, paid internship supervised by the EPP.

(2) Inactive status. An intern certificate will become inactive 30 calendar days after the holder's separation from the school assignment or the EPP. The unexpired term of an intern certificate may be reactivated if the holder satisfies the requirements specified in this section.

(3) Term of an intern certificate. An intern certificate shall be valid for one 12-month period from the date of issuance.

(4) Limit on preliminary certifications and permits. Without obtaining standard certification, an individual may not serve for more than three 12-month periods while holding any combination of the following:

(A) intern certificates, limited to one 12-month period maximum, as described in this subsection;

(B) probationary certificates, limited to two 12-month periods maximum, as specified in §230.37 of this title (relating to Probationary Certificates)

(C) emergency permits as specified in Subchapter F of this chapter (relating to Permits); or

(D) one-year certificates as specified in Subchapter H of this chapter (relating to Texas Educator Certificates Based on Certification and College Credentials from Other States or Territories of the United States) and Chapter 245 of this title (relating to Certification of Educators from Other Countries).

(5) Reduction in force exception. If an educator is employed under an intern certificate and is terminated or resigns in lieu of termination before the end of the school year due to a reduction in force, that intern term shall not count as one of the three years referenced in paragraph (4) of this subsection.

(d) Testing requirements for issuance of an intern certificate. Beginning September 1, 2017, a candidate must meet the subject matter knowledge requirements for issuance of an intern certificate to serve an internship in a classroom teacher assignment for each subject area to be taught.

(1) To meet the subject matter knowledge requirements to be issued an intern certificate for an internship in a classroom teacher assignment on or after September 1, 2017, a candidate must pass all of the appropriate content pedagogy examinations, as prescribed in Subchapter C of this chapter.

(2) To meet the subject matter knowledge requirements to be issued an intern certificate for an internship in a career and technical education classroom teacher assignment that is based on skill and experience on or after September 1, 2017, a candidate must satisfy the requirements for that subject area contained in §233.14 of this title (relating to Career and Technical Education (Certificates requiring experience and preparation in a skill area)) and pass the appropriate content pedagogy examination(s), as prescribed in Subchapter C of this chapter (relating to Assessment of Educators).

(e) Intern certificate in a certification class other than classroom teacher. An intern certificate may be issued for assignment as a superintendent, principal, reading specialist, master teacher, school librarian, school counselor, and educational diagnostician to an individual who meets the applicable requirements prescribed in subsection (b) of this section and who also meets the requirements prescribed in this subsection.

(1) An applicant for an intern certificate in a certification class other than classroom teacher must meet all requirements established by the recommending EPP, which shall be based on the qualifications and requirements for the class of certification sought and the duties to be performed by the holder of an intern certificate in that class.

(2) The individual must have also been:

(A) accepted and enrolled to participate in a Texas EPP that has been approved to prepare candidates for the certificate sought; and

(B) assigned in the certificate area being sought in a Texas school district, open-enrollment charter school, or, pursuant to §228.35 of this title (relating to Preparation Program Coursework and/or Training), other school approved by the TEA.

(3) The holder of an intern certificate in a certification class other than classroom teacher is subject to all terms and conditions of an intern certificate prescribed in subsection (c) of this section.

(4) The following provisions apply to the intern certificate for Principal as Instructional Leader.

(A) During the transition period of December 1, 2018 through September 1, 2019, the SBEC may issue an intern certificate to a candidate who meets the requirements specified in paragraphs (1)-(3) of this subsection.

(B) Effective September 1, 2019, the SBEC may issue an intern certificate to a candidate who meets requirements specified in paragraphs (1)-(3) of this subsection and has passed the Principal as Instructional Leader examination specified in Subchapter C of this chapter [relating to Assessment of Educators].

(f) Intern certificate for intensive pre-service. An intern certificate may be issued to an applicant who is admitted to an EPP intensive pre-service as prescribed in §228.33 of this title (relating to Intensive Pre-Service) on or after January 1, 2020, who:

(1) obtained a passing score on the aligned pedagogical rubric specified in §228.33 of this title;

(2) obtained a passing score, in accordance with §151.1001 of this title (relating to Passing Standards), on the required content certification (subject-matter only) examination and the following additional requirements for special education and bilingual assignments;

(A) Special education assignments also require a passing score, in accordance with §151.1001 of this title, on the TExES Special Education Supplemental examination prescribed in §230.21(e) of this title (relating to Educator Assessment); and

(B) Bilingual education assignments also require a passing score, in accordance with §151.1001 of this title, on the TExES Bilingual Target Language Proficiency examination or the related language proficiency examination prescribed in §230.21(e) of this title; and

(C) English as Second Language (ESL) assignments also require a passing score, in accordance with §151.1001 of this title, on the TExES ESL Supplemental examination or the related language proficiency examination prescribed in §230.21(e) of this title; and

(3) met the requirements as prescribed in subsections (a)-(c) of this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.



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TRD-201904886

Cristina De La Fuente-Valadez

Director, Rulemaking

State Board for Educator Certification

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 475-1497



## SUBCHAPTER E. EDUCATIONAL AIDE CERTIFICATE

### 19 TAC §230.55

**STATUTORY AUTHORITY.** The amendment implements Texas Education Code (TEC), §21.041(a), which states that the board may adopt rules as necessary for its own procedures; and TEC, §21.041(b)(1)-(4), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid.

**CROSS REFERENCE TO STATUTE.** The amendment is proposed under Texas Education Code (TEC) §§21.041(a) and (b)(1)-(4).

*§230.55. Certification Requirements for Educational Aide I.*

An applicant for an educational aide I certificate shall meet the requirements in either paragraphs (1) and (2) of this section or paragraphs (3) and (4) of this section as follows:

(1) hold a high school diploma, the equivalent of a high school diploma, or higher; and

(2) have experience working with students or parents as approved by the employing superintendent. Experience may be work in church-related schools, day camps, youth groups, private schools, licensed daycare centers, or similar experience; or [-]

(3) be a high school student 18 years of age or older; and

(4) have a final grade of 70 or better in two or more education and training courses specified in Chapter 130, Subchapter E, of this title (relating to Education and Training) for three or more credits verified in writing by the superintendent of the district where the credits were earned. The education and training courses must include either:

(A) Instructional Practices, as described in §130.164 of this title (relating to Instructional Practices (Two Credits), Adopted 2015); or

(B) Practicum in Education and Training, as described in §130.165 of this title (relating to Practicum in Education and Training (Two Credits), Adopted 2015).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## SUBCHAPTER G. CERTIFICATE ISSUANCE PROCEDURES

### 19 TAC §230.104, §230.105

**STATUTORY AUTHORITY.** The amendments implement Texas Education Code (TEC), §21.031(a), which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; TEC, §21.041(b)(1)-(5), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid; requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; and requires the SBEC to propose rules that include requirements for educators that hold a similar certification issued by another state or foreign country; TEC, §21.041(b)(9), which requires the SBEC to propose rules for the regulation of continuing education requirements; TEC, §21.041(c), which states that the SBEC may adopt fees for the issuance and maintenance of an educator certification to adequately cover the cost of the administration; TEC, §21.044(a), as amended by SBs 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to propose rules establishing training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program; TEC, §21.044(e), which states that in proposing rules under this section for a person to obtain a certificate to teach a health science technology education course, the board shall specify that a person must have: (1) an associate degree or more advanced degree from an accredited institution of higher education; (2) current licensure, certification, or registration as a health professions practitioner issued by a nationally recognized accrediting agency for health professionals; and (3) at least two years of wage-earning experience utilizing the licensure requirement; TEC, §21.044(f), which states that the SBEC may not propose rules for a certificate to teach a health science technology education course that specifies that a person must have a bachelor's degree or that establish any other credential or teaching experience requirements that exceed the requirements under Subsection (e); TEC, §21.048, as amended by HB 3, 86th Texas Legislature, 2019, which states that the SBEC shall propose rules prescribing comprehensive examinations for each class of certificate issued by the board that includes not requiring more than 45 days elapsing between examination retakes and that starting January 1, 2021, all candidates teaching prekindergarten through grade six must demonstrate proficiency in the science of teaching reading on a certification examination; TEC, §21.0485, which states the issuance requirements for certification to teach students with visual impairments; TEC, §21.0489, which specifies the issuance requirements for the Early Childhood: Prekindergarten-Grade 3 certi-

fication; TEC, §21.050(a), which states that a person who applies for a teaching certificate must possess a bachelor's degree; TEC, §21.050(b), as amended by HB 3217, 86th Texas Legislature, 2019, which states that the SBEC shall provide for a minimum number of semester credit hours for field-based experience of internship; TEC, §21.050(c), which states that a person who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate; TEC, §22.082, which requires SBEC to subscribe to the criminal history clearinghouse as provided by Texas Government Code, §411.0845, and may obtain any law enforcement or criminal history records that relate to a specific applicant for or holder of a certificate issued under Chapter 21, Subchapter B; TEC, §22.0831(c), which requires SBEC to review the national criminal history of a person seeking certification; TEC, §22.0831(f)(1) and (2), which state that SBEC may propose rules regarding the deadline for the national criminal history check and implement sanctions for persons failing to comply with the requirements; and Texas Occupations Code, §53.105, which states that a licensing authority may require a fee that is in an amount sufficient to cover the cost of administration.

**CROSS REFERENCE TO STATUTE.** The amendments are proposed under Texas Education Code (TEC) §§21.031(a); 21.041(b)(1)-(5) and (9) and (c); 21.044(a), as amended by SBs 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017; (e), and (f); 21.048, as amended by House Bill (HB) 3, 86th Texas Legislature, 2019; 21.0485; 21.0489; 21.050, as amended by House Bill (HB) 3217, 86th Texas Legislature, 2019; 21.054(a), as amended by SBs 7, 179, and 1839, 85th Texas Legislature, Regular Session, 2017, and HB 2424, 86th Texas Legislature, 2019; 22.082; and 22.0831(c) and (f); and Texas Occupations Code, §53.105.

*§230.104. Correcting a Certificate or Permit Issued in Error.*

(a) If a certificate or permit is issued with an incorrect grade level, subject area, or effective date, the recommending entity may request a correction of the certificate or permit by submitting a written request to Texas Education Agency (TEA) staff and a fee equivalent to the fee for the original certificate or permit. The entity must provide sufficient justification for the correction.

(b) The request to amend or correct an intern or probationary certificate and the appropriate fee must be submitted to the TEA no later than six weeks from the date of issuance of the certificate or, in the case of a change of assignment, no later than six weeks from the date of the change. Within seven days, the educator must notify the recommending educator preparation program of any change in assignment that may affect the certification category required by the assignment according to the provisions of Chapter 231 of this title (relating to Requirements for Public School Personnel Assignments).

*§230.105. Issuance of Additional Certificates Based on Examination.*

A teacher who holds a valid provisional, professional, or standard classroom teaching certificate or a valid temporary classroom teaching certificate issued under the provisions of Subchapter H of this chapter (relating to Texas Educator Certificates Based on Certification and College Credentials from Other States or Territories of the United States), or Chapter 245 of this title (relating to Certification of Educators from Other Countries), and a bachelor's degree or higher from an accredited institution of higher education may qualify for an additional teaching field or certification to teach at another level by passing the appropriate certification examination(s) for that subject.

The teacher must submit the application to add certification based on an examination during the time the certificate is allowed to be issued by the State Board for Educator Certification. The application for the additional certification must be submitted during the validity period of the appropriate Texas classroom teaching certificate. If a teacher holds multiple teaching certificates, all teaching certificates must be active before adding certification by examination. The rule shall not be used to qualify a classroom teacher for:

- (1) initial certification;
- (2) the Teacher of Students with Visual Impairments Supplemental: Early Childhood-Grade 12 certificate;
- (3) the Early Childhood: Prekindergarten-Grade 3 certificate;
- (4) [(3)] another class of certificate, as listed in Subchapter D of this chapter (relating to Types and Classes of Certificates Issued); or
- (5) [(4)] certification for which no certification examination has been developed.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Cristina De La Fuente-Valadez

Director, Rulemaking

State Board for Educator Certification

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For further information, please call: (512) 475-1497



## TITLE 22. EXAMINING BOARDS

### PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS

#### CHAPTER 133. LICENSING SUBCHAPTER C. PROFESSIONAL ENGINEER LICENSE APPLICATION REQUIREMENTS

##### 22 TAC §133.29

The Texas Board of Professional Engineers and Land Surveyors (Board) proposes a new rule, 22 Texas Administrative Code (TAC), Chapter 133, Subchapter C, §133.29, regarding the Application for Temporary License for Military Spouses who are Licensed or Registered in Another State.

#### EXPLANATION OF AND JUSTIFICATION FOR THE PROPOSED RULES

The proposed rule implements Senate Bill (SB) 1200, 86th Legislature, Regular Session (2019), which amends Texas Occupations Code, Chapter 55, to authorize a military spouse to engage in a business or occupation for which a license is required, without obtaining the applicable license, if the military spouse is

currently licensed in good standing by another jurisdiction that has licensing requirements that are substantially equivalent to the licensing requirements in Texas. SB 1200 also authorizes a licensing agency to issue a license to a military spouse who meets such requirements.

The proposed rule is necessary to establish a process for the Board to identify which jurisdictions have licensing or registration requirements that are substantially equivalent to the requirements in Texas and to verify that a military spouse is licensed or registered in good standing in one of such jurisdictions. The proposed rule also provides for the issuance of a license or registration to a military spouse who meets these qualifications and successfully passes a criminal history background check. The license or registration issued under this proposed rule would expire annually and may be renewed twice, but expires on the third anniversary of the date the Board provided confirmation to the military spouse.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Lance Kinney, Ph.D., P.E., Executive Director for the Board, has determined that for each year of the first five years the proposed rule is in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rule.

Dr. Kinney has determined that for each year of the first five years the proposed rule is in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rule.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

Dr. Kinney has determined that for each year of the first five years the proposed rule is in effect, there will be no impact on the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

#### PUBLIC BENEFITS

Dr. Kinney has determined that for each year of the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of enforcing the proposed rule will be to provide consistency between state law and Board rules regarding licensing requirements; provide clear procedures for military spouses to become authorized to engage in professional engineering or land surveying; and permit military spouses to request a temporary license or registration, renewable for up to three years.

#### PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Dr. Kinney has determined that for each year of the first five-year period the proposed rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule because the confirmation of authority to practice and the license or registration established by the proposed rule can be obtained at no cost to military spouses who qualify under the proposed rule.

#### FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rule. Since the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic

Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

#### ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

This rule proposal is not subject to Texas Government Code §2001.0045 concerning increasing costs to regulated persons because this agency is a Self-Directed Semi-Independent (SDSI) agency and is exempt from that statute, but also because the proposed rule does not impose a cost on regulated persons under Government Code §2001.024, including another state agency, a special district, or a local government.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rule. For each year of the first five years the proposed rule will be in effect, the agency has determined the following:

1. The proposed rule does not create or eliminate a government program;
2. Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions;
3. Implementation of the proposed rule does not require an increase or decrease in future legislative appropriations to the agency because the agency, which is a self-directed, semi-independent agency, receives no legislative appropriations;
4. The proposed rule does not require an increase or decrease in fees paid to the agency;
5. The proposed rule does create a new regulation, but the new regulation is required by SB 1200. Military spouses who hold a current license in another jurisdiction having licensing requirements that are substantially equivalent to the requirements for a similar license in Texas would now be authorized to engage in a business or occupation without obtaining the license required for such business or occupation. Such military spouses who also successfully pass a criminal history background check would also be eligible to receive a license or registration for the business or occupation;
6. The proposed rule does not expand, limit, or repeal an existing regulation;
7. The proposed rule may increase the number of individuals subject to the rule's applicability. This is a new rule, so the number of individuals previously subject to the rule's applicability is zero. After the rule is adopted, the number of individuals subject to the rule's applicability will be increased to the number of military spouses who hold current licenses in other jurisdictions having licensing requirements that are substantially equivalent to the requirements in Texas and who desire to engage in a regulated business or occupation in Texas; and
8. The proposed rule does not positively or adversely affect this state's economy.

#### TAKINGS IMPACT ASSESSMENT

The Board has determined that no private real property interests are affected by the proposed rule and the proposed rule does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rule does

not constitute a taking or require a takings impact assessment under Government Code §2007.043.

## PUBLIC COMMENTS

Any comment or request for a public hearing must be submitted no later than 30 days after the publication of this notice to Lance Kinney, Ph.D., P.E., Executive Director, Texas Board of Professional Engineers and Land Surveyors, 1917 S. Interstate 35, Austin, Texas 78741, faxed to his attention at (512) 440-0417, or sent by email to [rules@pels.texas.gov](mailto:rules@pels.texas.gov).

## STATUTORY AUTHORITY

The new rule is proposed pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the Board to adopt and enforce any rule or bylaw necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering and land surveying. The proposed rule is proposed in accordance with Texas Occupations Code §1001.301, which requires a license to practice engineering. The proposed rule is also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 53 and 1001, which establish the Board's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Board.

No other statutes, articles or codes are affected by the proposed new rule.

*§133.29. Application for Temporary License for Military Spouses who are Licensed or Registered in Another State.*

(a) In accordance with §55.0041, Occupations Code, a military spouse who is currently licensed in good standing by a jurisdiction with licensing requirements that are substantially equivalent to the licensing requirements in this state may be issued a temporary license.

(b) To be eligible for the confirmation described in Occupations Code §55.0041(b)(3), the military spouse shall provide the board:

(1) notice on a completed board-approved form, as required by Occupations Code §55.0041(b)(2) (relating to Application for Standard License);

(2) sufficient documentation to verify that the military spouse is currently licensed or registered in another jurisdiction and has no restrictions, pending enforcement actions, or unpaid fees or penalties relating to the license or registration;

(3) proof of the military spouse's residency in this state; and

(4) a copy of the military spouse's identification card.

(c) The board will determine whether the licensing or registration requirements of another jurisdiction are substantially equivalent to the licensing or registration requirements set forth by the board. In determining substantial equivalency, the board will consider factors including education, examinations, experience, and enforcement history.

(d) The board may not charge a fee for the license or registration as set forth in §133.21(d)(1)(B) of this title (relating to Application for Standard License).

(e) Authority to engage in engineering or land surveying.

(1) An individual who receives confirmation from the board, as described in Occupations Code §55.0041(b)(3):

(A) may engage in the practice of engineering or land surveying only for the period during which the individual meets the requirements of Occupations Code §55.0041(d); and

(B) must immediately notify the board if the individual no longer meets the requirements of Occupations Code §55.0041(d).

(2) An individual is not required to undergo a criminal history background check to be eligible for the authority granted under this subsection.

(f) Temporary license.

(1) An individual who receives confirmation from the board, as described in Occupations Code §55.0041(b)(3), is eligible to receive a temporary license to practice engineering or a registration to practice land surveying issued by the Board if the individual:

(A) submits a completed application on a board-approved form; and

(B) undergoes and successfully passes a criminal history background check.

(2) A license or registration issued under this subsection expires annually and may be renewed twice, but expires on the third anniversary of the date the board provided the confirmation described in Occupations Code §55.0041(b)(3) and may not be further renewed.

(g) An individual who engages in the practice of engineering or land surveying under the authority, license, or registration established by this section is subject to the enforcement authority granted under Occupations Code, Chapter 51, and the laws and regulations applicable to the practice of engineering and land surveying.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-201904884

Lance Kinney, Ph.D., P.E.

Executive Director

Texas Board of Professional Engineers and Land Surveyors

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For further information, please call: (512) 440-7723



## PART 15. TEXAS STATE BOARD OF PHARMACY

### CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

#### SUBCHAPTER A. GENERAL PROVISIONS

##### 22 TAC §281.7

The Texas State Board of Pharmacy proposes amendments to §281.7, concerning Grounds for Discipline for a Pharmacist License. The amendments, if adopted, will remove failing to repay a student loan as a ground for discipline of a pharmacist license, in accordance with Senate Bill 37.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first

five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules regarding the grounds for which a pharmacist may be disciplined. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

- (1) The proposed amendments do not create or eliminate a government program;
- (2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;
- (3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;
- (4) The proposed amendments do not require an increase or decrease in fees paid to the agency;
- (5) The proposed amendments do not create a new regulation;
- (6) The proposed amendments do limit an existing regulation in order to be consistent with state law;
- (7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and
- (8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas, 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

*§281.7. Grounds for Discipline for a Pharmacist License.*

(a) For the purposes of the Act, §565.001(a)(2), "unprofessional conduct" is defined as engaging in behavior or committing an act that fails to conform with the standards of the pharmacy profession, including, but not limited to, criminal activity or activity involving moral turpitude, dishonesty, or corruption. This conduct shall include, but not be limited to:

- (1) dispensing a prescription drug pursuant to a forged, altered, or fraudulent prescription;
- (2) dispensing a prescription drug order pursuant to a prescription from a practitioner as follows:
  - (A) the dispensing of a prescription drug order not issued for a legitimate medical purpose or in the usual course of professional practice shall include the following:

- (i) dispensing controlled substances or dangerous drugs to an individual or individuals in quantities, dosages, or for periods of time which grossly exceed standards of practice, approved labeling of the federal Food and Drug Administration, or the guidelines published in professional literature; or

- (ii) dispensing controlled substances or dangerous drugs when the pharmacist knows or reasonably should have known that the controlled substances or dangerous drugs are not necessary or required for the patient's valid medical needs or for a valid therapeutic purpose;

(B) the provisions of subparagraph (A)(i) and (ii) of this paragraph are not applicable for prescriptions dispensed to persons with intractable pain in accordance with the requirements of the Intractable Pain Treatment Act, or to a narcotic drug dependent person in accordance with the requirements of Title 21, Code of Federal Regulations, §1306.07, and the Regulation of Narcotic Drug Treatment Programs Act;

- (3) delivering or offering to deliver a prescription drug or device in violation of this Act, the Controlled Substances Act, the Dangerous Drug Act, or rules promulgated pursuant to these Acts;

- (4) acquiring or possessing or attempting to acquire or possess prescription drugs in violation of this Act, the Controlled Substances Act, the Dangerous Drug Act, or rules adopted pursuant to these Acts;

- (5) distributing prescription drugs or devices to a practitioner or a pharmacy not in the course of professional practice or in violation of this Act, the Controlled Substances Act, Dangerous Drug Act, or rules adopted pursuant to these Acts;

- (6) refusing or failing to keep, maintain or furnish any record, notification or information required by this Act, the Controlled Substances Act, the Dangerous Drug Act, or rules adopted pursuant to these Acts;

- (7) refusing an entry into any pharmacy for any inspection authorized by the Act;

- (8) making false or fraudulent claims to third parties for reimbursement for pharmacy services;

- (9) operating a pharmacy in an unsanitary manner;

- (10) making false or fraudulent claims concerning any drug;

- (11) persistently and flagrantly overcharging for the dispensing of controlled substances;

- (12) dispensing controlled substances or dangerous drugs in a manner not consistent with the public health or welfare;

- (13) failing to practice pharmacy in an acceptable manner consistent with the public health and welfare;

- (14) refilling a prescription upon which there is authorized "prn" refills or words of similar meaning, for a period of time in excess of one year from the date of issuance of such prescription;

- (15) engaging in any act, acting in concert with another, or engaging in any conspiracy resulting in a restraint of trade, coercion, or a monopoly in the practice of pharmacy;

- (16) sharing or offering to share with a practitioner compensation received from an individual provided pharmacy services by a pharmacist;

- (17) obstructing a board employee in the lawful performance of his or her duties of enforcing the Act;

(18) engaging in conduct that subverts or attempts to subvert any examination or examination process required for a license to practice pharmacy. Conduct that subverts or attempts to subvert the pharmacist licensing examination process includes, but is not limited to:

(A) copying, retaining, repeating, or transmitting in any manner the questions contained in any examination administered by the board or questions contained in a question pool of any examination administered by the board;

(B) copying or attempting to copy another candidate's answers to any questions on any examination required for a license to practice pharmacy;

(C) obtaining or attempting to obtain confidential examination materials compiled by testing services or the board;

(D) impersonating or acting as a proxy for another in any examination required for a license to practice pharmacy;

(E) requesting or allowing another to impersonate or act as a proxy in any examination required for a license to practice pharmacy; or

(F) violating or attempting to violate the security of examination materials or the examination process in any manner;

(19) violating the provisions of an agreed board order or board order;

(20) dispensing a prescription drug while not acting in the usual course of professional pharmacy practice;

(21) failing to provide or providing false or fraudulent information on any application, notification, or other document required under this Act, the Dangerous Drug Act, the Controlled Substances Act, or rules adopted pursuant to those Acts;

(22) using abusive, intimidating, or threatening behavior toward a board member or employee during the performance of such member's or employee's lawful duties;

(23) failing to establish or maintain effective controls against the diversion or loss of controlled substances or dangerous drugs, loss of controlled substance or dangerous drug records, or failing to ensure that controlled substances or dangerous drugs are dispensed in compliance with state and federal laws or rules, by a pharmacist who is:

(A) a pharmacist-in-charge of a pharmacy;

(B) a sole proprietor or individual owner of a pharmacy;

(C) a partner in the ownership of a pharmacy; or

(D) a managing officer of a corporation, association, or joint-stock company owning a pharmacy. A pharmacist, as set out in subparagraphs (B) - (D) of this paragraph, is equally responsible with an individual designated as pharmacist-in-charge of such pharmacy to ensure that employee pharmacists and the pharmacy are in compliance with all state and federal laws or rules relating to controlled substances or dangerous drugs;

(24) failing to correct the issues identified in a warning notice by the specified time;

(25) being the subject of civil fines imposed by a federal or state court as a result of violating the Controlled Substances Act or the Dangerous Drug Act;

(26) selling, purchasing, or trading or offering to sell, purchase, or trade prescription drug samples; provided, however, this paragraph does not apply to:

(A) prescription drugs provided by a manufacturer as starter prescriptions or as replacement for such manufacturer's outdated drugs;

(B) prescription drugs provided by a manufacturer in replacement for such manufacturer's drugs that were dispensed pursuant to written starter prescriptions; or

(C) prescription drug samples possessed by a pharmacy of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost and if:

(i) the samples are possessed in compliance with the Prescription Drug Marketing Act of 1987;

(ii) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, §501(c)(3), or by a city, state or county government; and

(iii) the samples are for dispensing or provision at no charge to patients of such health care entity.

(27) selling, purchasing, or trading or offering to sell, purchase, or trade prescription drugs:

(A) sold for export use only;

(B) purchased by a public or private hospital or other health care entity; or

(C) donated or supplied at a reduced price to a charitable organization described in the Internal Revenue Code of 1986, §501(c)(3);

(D) provided that subparagraphs (A) - (C) of this paragraph do not apply to:

(i) the purchase or other acquisition by a hospital or other health care entity which is a member of a group purchasing organization or from other hospitals or health care entities which are members of such organization;

(ii) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug by an organization described in subparagraph (C) of this paragraph to a nonprofit affiliate of the organization to the extent otherwise permitted by law;

(iii) the sale, purchase or trade of a drug or an offer to sell, purchase, or trade a drug among hospitals or other health care entities which are under common control;

(iv) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug for emergency medical reasons including the transfer of a drug between pharmacies to alleviate temporary shortages of the drug arising from delays in or interruptions of regular distribution schedules; or

(v) the dispensing of a prescription drug pursuant to a valid prescription drug order to the extent otherwise permitted by law;

(28) selling, purchasing, or trading, or offering to sell, purchase, or trade:

(A) misbranded prescription drugs; or

(B) prescription drugs beyond the manufacturer's expiration date;

{(29) failing to repay a guaranteed student loan, as provided in Texas Education Code, §57.491;}

(29) [(30)] failing to respond and to provide all requested records within the time specified in an audit of continuing education records under §295.8 of this title (relating to Continuing Education Requirements); or

(30) [(31)] allowing an individual whose license to practice pharmacy, either as a pharmacist or a pharmacist-intern, or a pharmacy technician/trainee whose registration has been disciplined by the board, resulting in the license or registration being revoked, canceled, retired, surrendered, denied or suspended, to have access to prescription drugs in a pharmacy.

(b) For the purposes of the Act, §565.001(a)(3), the term "gross immorality" shall include, but not be limited to:

(1) conduct which is willful, flagrant, and shameless, and which shows a moral indifference to standards of the community;

(2) engaging in an act which is a felony;

(3) engaging in an act that constitutes sexually deviant behavior; or

(4) being required to register with the Department of Public Safety as a sex offender under Chapter 62, Code of Criminal Procedure.

(c) For the purposes of the Act, §565.001(a)(5), the terms "fraud," "deceit," or "misrepresentation" in the practice of pharmacy or in seeking a license to act as a pharmacist shall be defined as follows.

(1) "Fraud" means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him, or to surrender a legal right, or to issue a license; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives or is intended to deceive another.

(2) "Deceit" means the assertion, as a fact, of that which is not true by any means whatsoever to deceive or defraud another.

(3) "Misrepresentation" means a manifestation by words or other conduct which is a false representation of a matter of fact.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

TRD-201904902

Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 305-8010



## 22 TAC §281.9

The Texas State Board of Pharmacy proposes amendments to §281.9, concerning Grounds for Discipline for a Pharmacy Technician or a Pharmacy Technician Trainee. The amendments, if adopted, remove failing to repay a student loan as a ground for discipline of a pharmacy technician or a pharmacy technician trainee registration, in accordance with Senate Bill 37.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period

the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules regarding the grounds for which a pharmacy technician or a pharmacy technician trainee registration may be disciplined. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation in order to be consistent with state law;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas, 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

*§281.9. Grounds for Discipline for a Pharmacy Technician or a Pharmacy Technician Trainee.*

(a) Pharmacy technicians and pharmacy technician trainees shall be subject to all disciplinary grounds set forth in §568.003 of the Act.

(b) For the purposes of the Act, §568.003(a)(10), "negligent, unreasonable, or inappropriate conduct" shall include, but not be limited to:

(1) delivering or offering to deliver a prescription drug or device in violation of this Act, the Controlled Substances Act, the Dangerous Drug Act, or rules promulgated pursuant to these Acts;

(2) acquiring or possessing or attempting to acquire or possess prescription drugs in violation of this Act, the Controlled Substances Act, or Dangerous Drug Act or rules adopted pursuant to these Acts;

(3) failing to perform the duties of a pharmacy technician or pharmacy technician trainee in an acceptable manner consistent with the public health and welfare, which contributes to a prescription not being dispensed or delivered accurately;

(4) obstructing a board employee in the lawful performance of his duties of enforcing the Act;

(5) violating the provisions of an agreed board order or board order, including accessing prescription drugs with a revoked or suspended pharmacy technician or pharmacy technician trainee registration;

(6) abusive, intimidating, or threatening behavior toward a board member or employee during the performance of such member's or employee's lawful duties; or

~~[(7) failing to repay a guaranteed student loan, as provided in the Texas Education Code, §57.491; or]~~

(7) ~~[(8)]~~ failing to respond and to provide all requested records within the time specified in an audit of continuing education records under §297.8 of this title (relating to Continuing Education Requirements).

(c) For the purposes of the Act, §568.003(a)(2), the term "gross immorality" shall include, but not be limited to:

(1) conduct which is willful, flagrant, and shameless, and which shows a moral indifference to standards of the community;

(2) engaging in an act which is a felony;

(3) engaging in an act that constitutes sexually deviant behavior; or

(4) being required to register with the Department of Public Safety as a sex offender under Chapter 62, Code of Criminal Procedure.

(d) For the purposes of the Act, §568.003(a)(3), the terms "fraud," "deceit," or "misrepresentation" shall apply to an individual seeking a registration as a pharmacy technician, as well as making an application to any entity that certifies or registers pharmacy technicians, and shall be defined as follows:

(1) "Fraud" means an intentional perversion of truth for the purpose of inducing the board in reliance upon it to issue a registration; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives or is intended to deceive the board.

(2) "Deceit" means the assertion, as a fact, of that which is not true by any means whatsoever to deceive or defraud the board.

(3) "Misrepresentation" means a manifestation by words or other conduct which is a false representation of a matter of fact.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8010



## SUBCHAPTER C. DISCIPLINARY GUIDELINES

### 22 TAC §281.66

The Texas State Board of Pharmacy proposes amendments to §281.66, concerning Application for Reissuance or Removal of Restrictions of a License or Registration. The amendments, if adopted, remove arrests as an item the board may consider in determining the reinstatement of an applicant's previously revoked or canceled license or registration, in accordance with Senate Bill 1217.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules regarding the consideration of arrests in determining the reinstatement of an applicant's previously revoked or canceled license or registration. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation in order to be consistent with state law;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas, 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.



The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§281.66. *Application for Reissuance or Removal of Restrictions of a License or Registration.*

(a) A person whose pharmacy license, pharmacy technician registration, or license or registration to practice pharmacy has been canceled, revoked, or restricted, whether voluntary or by action of the board, may, after 12 months from the effective date of such cancellation, revocation, or restriction, apply to the board for reinstatement or removal of the restriction of the license or registration.

(1) The application shall be given under oath and on the form prescribed by the board.

(2) A person applying for reinstatement or removal of restrictions may be required to meet all requirements necessary in order for the board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs.

(3) A person applying for reinstatement or removal of restrictions has the burden of proof.

(4) On investigation and hearing, the board may in its discretion grant or deny the application or it may modify its original finding to reflect any circumstances that have changed sufficiently to warrant the modification.

(5) If such application is denied by the board, a subsequent application may not be considered by the board until 12 months from the date of denial of the previous application.

(6) The board in its discretion may require a person to pass an examination or examinations to reenter the practice of pharmacy.

(7) The fee for reinstatement of a license or registration shall be \$100 which is to be paid to the Texas State Board of Pharmacy and includes the processing of the reinstatement application.

(b) In reinstatement cases not involving criminal offenses, the board may consider the following items in determining the reinstatement of an applicant's previously revoked or canceled license or registration:

- (1) moral character in the community;
- (2) employment history;
- (3) financial support to his/her family;
- (4) participation in continuing education programs or other methods of maintaining currency with the practice of pharmacy;
- (5) criminal history record~~including arrests, indictments, and convictions relating to felonies or misdemeanors involving moral turpitude~~;
- (6) offers of employment in pharmacy;
- (7) involvement in public service activities in the community;
- (8) failure to comply with the provisions of the board order revoking or canceling the applicant's license or registration;

- (9) action by other state or federal regulatory agencies;
- (10) any physical, chemical, emotional, or mental impairment;
- (11) the gravity of the offense for which the applicant's license or registration was canceled, revoked, or restricted and the impact the offense had upon the public health, safety and welfare;
- (12) the length of time since the applicant's license or registration was canceled, revoked or restricted, as a factor in determining whether the time period has been sufficient for the applicant to have rehabilitated himself/herself to be able to practice pharmacy in a manner consistent with the public health, safety and welfare;
- (13) competency to engage in the practice of pharmacy; or
- (14) other rehabilitation actions taken by the applicant.

(c) If a reinstatement case involves criminal offenses, the sanctions specified in §281.64 of this chapter (relating to Sanctions for Criminal Offenses) apply.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 305-8010



## 22 TAC §281.69

The Texas State Board of Pharmacy proposes new §281.69, concerning Automatic Denial or Revocation. The new rule, if adopted, provides for the automatic denial of a pharmacist licensure application or revocation of a pharmacist license for certain criminal offenses, in accordance with House Bill 1899.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the proposed rule will be to provide consistency between state law and Board rules regarding the automatic denial of a pharmacist licensure application or revocation of a pharmacist license for certain criminal offenses. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed rule will be in effect, Ms. Benz has determined the following:

- (1) The proposed rule does not create or eliminate a government program;
- (2) Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed rule does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed rule does not require an increase or decrease in fees paid to the agency;

(5) The proposed rule does create a new regulation in order to be consistent with state law;

(6) The proposed rule does not limit or expand an existing regulation because it creates a new regulation;

(7) The proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed rule does not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The new rule is proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the proposed rule: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§281.69. Automatic Denial or Revocation.

(a) Notwithstanding subsection (c) of this section, as required in Texas Occupations Code, §§108.052 and 108.053, the board shall deny an application for licensure as a pharmacist by or immediately upon receiving notification as specified in §108.053(b) revoke the pharmacist license of a person who:

(1) is required to register as a sex offender under Chapter 62, Code of Criminal Procedure;

(2) has been previously convicted of or placed on deferred adjudication community supervision for the commission of a felony offense involving the use or threat of force; or

(3) has been previously convicted of or placed on deferred adjudication community supervision for the commission of an offense:

(A) under Penal Code, §§22.011, 22.02, 22.021, or 22.04, or an offense under the laws of another state or federal law that is equivalent to an offense under one of those sections;

(B) committed:

(i) when the applicant held a license as a health care professional in this state or another state;

(ii) in the course of providing services within the scope of the applicant's license; and

(4) in which the victim of the offense was a patient of the applicant.

(b) As specified in Texas Occupations Code, §108.054, a person whose license application is denied under this subsection:

(1) based on a conviction or placement on deferred adjudication community supervision for an offense described by subsections (f)(1)(B) or (C) of this section may reapply for a license if the con-

viction or deferred adjudication is reversed, set aside, or vacated on appeal; or

(2) based on a requirement to register as a sex offender under Chapter 62, Code of Criminal Procedure, may reapply for a license after the expiration of the period for which the person is required to register.

(c) As specified in Texas Occupations Code, §108.055, a person whose license is revoked under this subsection:

(1) based on a conviction or placement on deferred adjudication community supervision for an offense described by subsections (f)(1)(B) or (C) of this section may apply for reinstatement of the license if the conviction or deferred adjudication is reversed, set aside, or vacated on appeal; or

(2) based on a requirement to register as a sex offender under Chapter 62, Code of Criminal Procedure, may apply for reinstatement of the license after the expiration of the period for which the person is required to register.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8010



**22 TAC §281.70**

The Texas State Board of Pharmacy proposes a new rule §281.70, concerning Surety Bond. The new rule, if adopted, specifies that the board may require a surety bond if an investigation of a pharmacy involves section 565.002(a)(7) or (10) of the Pharmacy Act, in accordance with House Bill 3496.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the proposed rule will be to provide consistency between state law and Board rules regarding the board's authority to require a surety bond from a pharmacy under investigation for certain issues. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed rule will be in effect, Ms. Benz has determined the following:

(1) The proposed rule does not create or eliminate a government program;

(2) Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions;

- (3) Implementation of the proposed rule does not require an increase or decrease in the future legislative appropriations to the agency;
- (4) The proposed rule does not require an increase or decrease in fees paid to the agency;
- (5) The proposed rule does create a new regulation in order to be consistent with state law;
- (6) The proposed rule does not limit or expand an existing regulation;
- (7) The proposed rule does increase the number of individuals subject to the rule's applicability; and
- (8) The proposed rule does not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The new rule is proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the proposed rule: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

#### §281.70. Surety Bond.

The Board may require a surety bond if an investigation of a pharmacy involves §565.002(a)(7) or (10) of the Act.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8010



## CHAPTER 291. PHARMACIES

### SUBCHAPTER A. ALL CLASSES OF PHARMACIES

#### 22 TAC §291.1

The Texas State Board of Pharmacy proposes amendments to §291.1, concerning Pharmacy License Application. The amendments, if adopted, clarify that an applicant for a pharmacy license must submit a sworn disclosure statement, in accordance with House Bill 3496, and correct a grammatical error.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period

the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide clearer regulatory language and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

- (1) The proposed amendments do not create or eliminate a government program;
- (2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;
- (3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;
- (4) The proposed amendments do not require an increase or decrease in fees paid to the agency;
- (5) The proposed amendments do not create a new regulation;
- (6) The proposed amendments do expand an existing regulation by clarifying that an applicant for a pharmacy license must submit a sworn disclosure statement.
- (7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and
- (8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas, 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

#### *§291.1. Pharmacy License Application.*

(a) To qualify for a pharmacy license, the applicant must submit an application which includes any information requested on the application and, as required by §560.052(b) of the Act, a sworn disclosure statement as specified in §291.4 of this title (relating to Sworn Disclosure Statement).

(b) The applicant may be required to meet all requirements necessary in order for the Board to access the criminal history record information, including submitting fingerprint information and being responsible for all associated costs. The criminal history information may be required for each individual owner, or if the pharmacy is owned

by a partnership or a closely held corporation for each managing officer.

(c) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance of a pharmacy license.

(d) For the purposes [purpose] of this section, managing officers are defined as the top four executive officers, including the corporate officer in charge of pharmacy operations, who are designated by the partnership or corporation to be jointly responsible for the legal operation of the pharmacy.

(e) Prior to the issuance of a license for a pharmacy located in Texas, the board shall conduct an on-site inspection of the pharmacy in the presence of the pharmacist-in-charge and owner or representative of the owner, to ensure that the pharmacist-in-charge and owner can meet the requirements of the Texas Pharmacy Act and Board Rules.

(f) If the applicant holds an active pharmacy license in Texas on the date of application for a new pharmacy license or for other good cause shown as specified by the board, the board may waive the pre-inspection as set forth in subsection (e) of this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

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For further information, please call: (512) 305-8010



## 22 TAC §291.3

The Texas State Board of Pharmacy proposes amendments to §291.3, concerning Required Notifications. The amendments, if adopted, clarify that notification to the Board of a change of managing officer or application for change of ownership shall include an updated sworn disclosure statement, in accordance with House Bill 3496, and correct grammatical errors.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide clearer regulatory language and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do expand an existing regulation by clarifying that notification to the Board of a change in managing officer must include an updated sworn disclosure statement;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

### §291.3. Required Notifications.

#### (a) Change of Location.

(1) When a pharmacy changes location, the following is applicable:

(A) A new completed pharmacy application containing the information outlined in §291.1 of this title (relating to Pharmacy License Application)[5] must be filed with the board not later than 30 days before the date of the change of location of the pharmacy;[-]

(B) The previously issued license must be returned to the board office;[-]

(C) An amended license reflecting the new location of the pharmacy will be issued by the board; and

(D) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance of the amended license.

(2) At least 14 days prior to the change of location of a pharmacy that dispenses prescription drug orders, the pharmacist-in-charge shall post a sign in a conspicuous place indicating that the pharmacy is changing locations. Such sign shall be in the front of the prescription department and at all public entrance doors to the pharmacy and shall indicate the date the pharmacy is changing locations.

(3) Disasters, accidents, and emergencies which require the pharmacy to change location shall be immediately reported to the board. If a pharmacy changes location suddenly due to disasters, accidents, or other emergency circumstances and the pharmacist-in-charge cannot provide notification 14 days prior to the change of location, the

pharmacist-in-charge shall comply with the provisions of paragraph (2) of this subsection as far in advance of the change of location as allowed by the circumstances.

(4) When a Class A-S, C-S, or E-S pharmacy changes location, the pharmacy's classification will revert to a Class A, Class C, or Class E unless or until the board [Board] or its designee has inspected the new location to ensure the pharmacy meets the requirements as specified in §291.133 of this title (relating to Pharmacies Compounding Sterile Preparations).

(5) When a Class B pharmacy changes location, the board [Board] shall inspect the pharmacy at the new location to ensure the pharmacy meets the requirements as specified in subchapter C of this title (relating to Nuclear Pharmacy (Class B)) prior to the pharmacy becoming operational.

(b) Change of Name. When a pharmacy changes its name, the following is applicable:[-]

(1) A new completed pharmacy application containing the information outlined in §291.1 of this title (relating to Pharmacy License Application)[-] must be filed with the board within 10 days of the change of name of the pharmacy;[-]

(2) The previously issued license must be returned to the board office;[-]

(3) An amended license reflecting the new name of the pharmacy will be issued by the board; and

(4) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance of the amended license.

(c) Change of Managing Officers.

(1) The owner of a pharmacy shall notify the board in writing within 10 days of a change of any managing officer of a partnership or corporation which owns a pharmacy. The written notification shall include the effective date of such change, an updated sworn disclosure statement as required by §560.052(b) of the Act and as specified in §291.4 of this title (relating to Sworn Disclosure Statement), and the following information for all managing officers:

(A) name and title;

(B) home address and telephone number;

(C) date of birth;

(D) a copy of social security card or other official document showing the social security number as approved by the board; and

(E) a copy of current driver's license, state issued photo identification card, or passport.

(2) For purposes of this subsection, managing officers are defined as the top four executive officers, including the corporate officer in charge of pharmacy operations, who are designated by the partnership or corporation to be jointly responsible for the legal operation of the pharmacy.

(d) Change of Ownership.

(1) When a pharmacy changes ownership, a new pharmacy application must be filed with the board following the procedures as specified in §291.1 of this title (relating to Pharmacy License Application), including, as required by §560.052(b) of the Act, the submission of a sworn disclosure statement as specified in §291.4 of this title (relating to Sworn Disclosure Statement). In addition, a copy of the pur-

chase contract or mutual agreement between the buyer and seller must be submitted.

(2) The license issued to the previous owner must be returned to the board.

(3) A fee as specified in §291.6 of this title will be charged for issuance of a new license.

(e) Change of Pharmacist Employment.

(1) Change of pharmacist employed in a pharmacy. When a change in pharmacist employment occurs, the pharmacist shall report such change in writing to the board within 10 days.

(2) Change of pharmacist-in-charge of a pharmacy. The incoming pharmacist-in-charge shall be responsible for notifying the board within 10 days in writing on a form provided by the board that a change of pharmacist-in-charge has occurred. The notification shall include the following:

(A) the name and license number of the departing pharmacist-in-charge;

(B) the name and license number of the incoming pharmacist-in-charge;

(C) the date the incoming pharmacist-in-charge became the pharmacist-in-charge; and

(D) a statement signed by the incoming pharmacist-in-charge attesting that:

(i) an inventory, as specified in §291.17 of this title (relating to Inventory Requirements), has been conducted by the departing and incoming pharmacists-in-charge; if the inventory was not taken by both pharmacists, the statement shall provide an explanation; and

(ii) the incoming pharmacist-in-charge has read and understands the laws and rules relating to this class of pharmacy.

(f) Notification of Theft or Loss of a Controlled Substance or a Dangerous Drug.

(1) Controlled substances. For the purposes of the Act, §562.106, the theft or significant loss of any controlled substance by a pharmacy shall be reported in writing to the board immediately on discovery of such theft or loss. A pharmacy shall be in compliance with this subsection by submitting to the board a copy of the Drug Enforcement Administration (DEA) report of theft or loss of controlled substances, DEA Form 106, or by submitting a list of all controlled substances stolen or lost.

(2) Dangerous drugs. A pharmacy shall report in writing to the board immediately on discovery the theft or significant loss of any dangerous drug by submitting a list of the name and quantity of all dangerous drugs stolen or lost.

(g) Fire or Other Disaster. If a pharmacy experiences a fire or other disaster, the following requirements are applicable.

(1) Responsibilities of the pharmacist-in-charge.

(A) The pharmacist-in-charge shall be responsible for reporting the date of the fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or the treatment of [the] injury, illness, and disease; such notification shall be reported to the board, within 10 days from the date of the disaster.

(B) The pharmacist-in-charge or designated agent shall comply with the following procedures.

(i) If controlled substances, dangerous drugs, or Drug Enforcement Administration (DEA) order forms are lost or destroyed in the disaster, the pharmacy shall:

(I) notify the DEA and the board of the loss of the controlled substances or order forms immediately upon discovery; and

(II) notify the board in writing of the loss of the dangerous drugs by submitting a list of the dangerous drugs lost.

(ii) If the extent of the loss of controlled substances or dangerous drugs is not able to be determined, the pharmacy shall:

(I) take a new, complete inventory of all remaining drugs specified in §291.17(c) of this title (relating to Inventory Requirements);

(II) submit to the DEA a statement attesting that the loss of controlled substances is indeterminable and that a new, complete inventory of all remaining controlled substances was conducted and state the date of such inventory; and

(III) submit to the board a statement attesting that the loss of controlled substances and dangerous drugs is indeterminable and that a new, complete inventory of the drugs specified in §291.17(c) of this title was conducted and state the date of such inventory.

(C) If the pharmacy changes to a new, permanent location, the pharmacist-in-charge shall comply with subsection (a) of this section.

(D) If the pharmacy moves to a temporary location, the pharmacist shall comply with subsection (a) of this section. If the pharmacy returns to the original location, the pharmacist-in-charge shall again comply with subsection (a) of this section.

(E) If the pharmacy closes due to fire or other disaster, the pharmacy may not be closed for longer than 90 days as specified in §291.11 of this title (relating to Operation of a Pharmacy).

(F) If the pharmacy discontinues business (ceases to operate as a pharmacy), the pharmacist-in-charge shall comply with §291.5 of this title (relating to Closing a Pharmacy).

(G) The pharmacist-in-charge shall maintain copies of all inventories, reports, or notifications required by this section for a period of two years.

(2) Drug stock.

(A) Any drug which has been exposed to excessive heat, smoke, or other conditions which may have caused deterioration shall not be dispensed.

(B) Any potentially adulterated or damaged drug shall only be sold, transferred, or otherwise distributed pursuant to the provisions of the Texas Food Drug and Cosmetics Act (Chapter 431, Health and Safety Code) administered by the Bureau of Food and Drug Safety of the Texas Department of State Health Services.

(h) Notification to Consumers.

(1) Pharmacy.

(A) Every licensed pharmacy shall provide notification to consumers of the name, mailing address, Internet site address, and telephone number of the board for the purpose of directing complaints concerning the practice of pharmacy to the board. Such notification shall be provided as follows.

(i) If the pharmacy serves walk-in customers, the pharmacy shall either:

(I) post in a prominent place that is in clear public view where prescription drugs are dispensed:

(-a-) a sign which notifies the consumer that complaints concerning the practice of pharmacy may be filed with the board and list the board's name, mailing address, Internet site address, telephone number, and a toll-free telephone number for filing complaints; or

(-b-) an electronic messaging system in a type size no smaller than ten-point Times Roman which notifies the consumer that complaints concerning the practice of pharmacy may be filed with the board and list the board's name, mailing address, Internet site address, telephone number, and a toll-free number for filing complaints; or

(II) provide with each dispensed prescription a written notification in a type size no smaller than ten-point Times Roman which states the following: "Complaints concerning the practice of pharmacy may be filed with the Texas State Board of Pharmacy at: (list the mailing address, Internet site address, telephone number of the board, and a toll-free telephone number for filing complaints)."

(ii) If the prescription drug order is delivered to patients at their residence or other designated location, the pharmacy shall provide with each dispensed prescription a written notification in type size no smaller than ten-point Times Roman which states the following: "Complaints concerning the practice of pharmacy may be filed with the Texas State Board of Pharmacy at: (list the mailing address, Internet site address, telephone number, and a toll-free telephone number for filing complaints)." If multiple prescriptions are delivered to the same location, only one such notice shall be required.

(iii) The provisions of this subsection do not apply to prescriptions for patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(B) A pharmacy that maintains a generally accessible site on the Internet that is located in Texas or sells or distributes drugs through this site to residents of this state shall post the following information on the pharmacy's initial home page and on the page where a sale of prescription drugs occurs.

(i) Information on the ownership of the pharmacy, to include at a minimum, the:

(I) owner's name or if the owner is a partnership or corporation, the partnership's or corporation's name and the name of the chief operating officer;

(II) owner's address;

(III) owner's telephone number; and

(IV) year the owner began operating pharmacies in the United States.

(ii) The Internet address and toll free telephone number that a consumer may use to:

(I) report medication/device problems to the pharmacy; and

(II) report business compliance problems.

(iii) Information about each pharmacy that dispenses prescriptions for this site, to include at a minimum, the:

(I) pharmacy's name, address, and telephone number;

(II) name of the pharmacist responsible for operation of the pharmacy;

(III) Texas pharmacy license number for the pharmacy and a link to the Internet site maintained by the Texas State Board of Pharmacy; and

(IV) the names of all other states in which the pharmacy is licensed, the license number in that state, and a link to the Internet site of the entity that regulates pharmacies in that state, if available.

(C) A pharmacy whose Internet site has been verified by the National Association of Boards of Pharmacy to be in compliance with the laws of this state, as well as in all other states in which the pharmacy is licensed shall be in compliance with subparagraph (B) of this paragraph.

(2) Texas State Board of Pharmacy. On or before January 1, 2005, the board shall establish a pharmacy profile system as specified in §2054.2606, Government Code.

(A) The board shall make the pharmacy profiles available to the public on the agency's Internet site.

(B) A pharmacy profile shall contain at least the following information:

(i) name, address, and telephone number of the pharmacy;

(ii) pharmacy license number, licensure status, and expiration date of the license;

(iii) the class and type of the pharmacy;

(iv) ownership information for the pharmacy;

(v) names and license numbers of all pharmacists working at the pharmacy;

(vi) whether the pharmacy has had prior disciplinary action by the board;

(vii) whether the pharmacy's consumer service areas are accessible to disabled persons, as defined by law;

(viii) the type of language translating services, including translating services for persons with impairment of hearing, that the pharmacy provides for consumers; and

(ix) insurance information including whether the pharmacy participates in the state Medicaid program.

(C) The board shall gather this information on initial licensing and update the information in conjunction with the license renewal for the pharmacy.

(i) Notification of Licensees or Registrants Obtaining Controlled Substances or Dangerous Drugs by Forged Prescriptions. If a licensee or registrant obtains controlled substances or dangerous drugs from a pharmacy by means of a forged prescription, the pharmacy shall report in writing to the board immediately on discovery of such forgery. A pharmacy shall be in compliance with this subsection by submitting to the board the following:

(1) name of licensee or registrant obtaining controlled substances or dangerous drugs by forged prescription;

(2) date(s) of forged prescription(s);

(3) name(s) and amount(s) of drug(s); and

(4) copies of forged prescriptions.

(j) Notification of Disciplinary Action. For the purpose of the Act, §562.106, a pharmacy shall report in writing to the board not later than the 10th day after the date of:

(1) a final order against the pharmacy license holder by the regulatory or licensing agency of the state in which the pharmacy is located if the pharmacy is located in another state; or

(2) a final order against a pharmacist who is designated as the pharmacist-in-charge of the pharmacy by the regulatory or licensing agency of the state in which the pharmacy is located if the pharmacy is located in another state.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

TRD-201904905

Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 305-8010



## 22 TAC §291.4

The Texas State Board of Pharmacy proposes a new §291.4, concerning Sworn Disclosure Statement. The new rule, if adopted, creates a requirement for a pharmacy license applicant to submit a sworn disclosure statement, in accordance with House Bill 3496.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the proposed rule will be to provide consistency between state law and Board rules regarding the requirements of applying for a pharmacy license. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed rule will be in effect, Ms. Benz has determined the following:

(1) The proposed rule does not create or eliminate a government program;

(2) Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed rule does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed rule does not require an increase or decrease in fees paid to the agency;

(5) The proposed rule does create a new regulation in order to be consistent with state law;

(6) The proposed rule does not limit or expand an existing regulation;

(7) The proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed rule does not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The new rule is proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the proposed rule: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.4. Sworn Disclosure Statement.

(a) The following words and terms, when used in this section, shall have the following meanings:

(1) Publicly traded company--a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)).

(2) Retail grocery store chain--ten or more stores under the same ownership which primarily sell produce, food, and beverage products that are intended for off premises consumption.

(b) To qualify for a pharmacy license, a sworn disclosure statement form must be submitted to the board, unless:

(1) the pharmacy for which the application is made is operated by a publicly traded company;

(2) the pharmacy for which the application is made is wholly owned by a retail grocery store chain; or

(3) the applicant is applying for a Class B or Class C pharmacy license.

(c) The sworn disclosure statement form must be notarized and must include any information requested on the form, including:

(1) the name of the pharmacy;

(2) the name of each person who has a direct financial investment in the pharmacy;

(3) the name of each person who:

(A) is not an individual;

(B) has any financial investment in the pharmacy; and

(C) is not otherwise disclosed under paragraph (2) of this subsection;

(4) the total amount or percentage of the financial investment made by each person described by paragraph (2) of this subsection; and

(5) the name of each of the following persons, if applicable, connected to the pharmacy if the person is not otherwise disclosed under paragraph (2) or (3) of this subsection:

(A) a partner;

(B) an officer;

(C) a director;

(D) a managing employee;

(E) an owner or person who controls the owner; and

(F) a person who acts as a controlling person of the pharmacy through the exercise of direct or indirect influence or control over the management of the pharmacy, the expenditure of money by the pharmacy, or a policy of the pharmacy, including:

(i) a management company, landlord, marketing company, or similar person who operates or contracts for the operation of a pharmacy and, if the pharmacy is a publicly traded corporation or is controlled by a publicly traded corporation, an officer or director of the corporation but not a shareholder or lender of the corporation;

(ii) an individual who has a personal, familial, or other relationship with an owner, manager, landlord, tenant, or provider of a pharmacy that allows the individual to exercise actual control of the pharmacy; and

(iii) any other person the board by rule requires to be included based on the person's exercise of direct or indirect influence or control.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

TRD-201904906

Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 305-8010



**22 TAC §291.14**

The Texas State Board of Pharmacy proposes amendments to §291.14, concerning Pharmacy License Renewal. The amendments, if adopted, add a requirement to submit a sworn disclosure statement, in accordance with House Bill 3496, and correct a grammatical error.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules regarding the requirement to submit a sworn disclosure statement with a pharmacy license application and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:



- (1) The proposed amendments do not create or eliminate a government program;
- (2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;
- (3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;
- (4) The proposed amendments do not require an increase or decrease in fees paid to the agency;
- (5) The proposed amendments do not create a new regulation;
- (6) The proposed amendments do expand an existing regulation in order to be consistent with state law;
- (7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and
- (8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

*§291.14. Pharmacy License Renewal.*

(a) Renewal requirements.

- (1) A license to operate a pharmacy expires on the last day of the assigned expiration month.
- (2) The provision of the Act, §561.005, shall apply if the completed application and a renewal fee is not received in the board's office on or before the last day of the assigned expiration month.
- (3) An expired license may be renewed according to the following schedule:
  - (A) If the license has been expired for 90 days or less, the license may be renewed by paying to the board a renewal fee that is equal to one and one-half times the required renewal fee as specified in §291.6 of this title (relating to Pharmacy License Fees).
  - (B) If the license has been expired for 91 days or more, the license may not be renewed. The pharmacy may apply for a new license as specified in §291.1 of this title (relating to Pharmacy License Application), including, as required by §560.052(b) of the Act, the submission of a sworn disclosure statement as specified in §291.4 of this title (relating to Sworn Disclosure Statement).
- (b) If the board determines on inspection at the pharmacy's address on or after the expiration date of the license that no pharmacy is located or exists at the pharmacy's address (e.g., the building is vacated or for sale or lease, or another business is operating at the location), the board shall not renew the license.

(c) Additional renewal requirements for Class E pharmacies. In addition to the renewal requirements in subsection (a) of this section, a Class E pharmacy shall have on file with the board [Board] an inspection report issued:

- (1) not more than three years before the date the renewal application is received; and
- (2) by the pharmacy licensing board in the state of the pharmacy's physical location except as provided in §291.104 of this title (relating to Operational Standards).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

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## SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

### 22 TAC §291.34

The Texas State Board of Pharmacy proposes amendments to §291.34, concerning Records. The amendments, if adopted, remove an outdated reference to the Department of Public Safety and correct grammatical errors.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to ensure correct, consistent, and clear regulatory language and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

- (1) The proposed amendments do not create or eliminate a government program;
- (2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;
- (3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;
- (4) The proposed amendments do not require an increase or decrease in fees paid to the agency;
- (5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation by removing an outdated reference;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.34. *Records.*

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under the provisions of Subchapter B of this chapter (relating to Community Pharmacy (Class A)) shall be:

(A) kept by the pharmacy at the pharmacy's licensed location and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records must be provided in a mutually agreeable electronic format if specifically requested by the board or its representative. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) Records of controlled substances listed in Schedule II shall be maintained separately from all other records of the pharmacy.

(3) Records of controlled substances, other than prescription drug orders, listed in Schedules III-V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, readily retrievable means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(4) Records, except when specifically required to be maintained in original or hard copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(A) the records maintained in the alternative system contain all of the information required on the manual record; and

(B) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(b) Prescriptions.

(1) Professional responsibility.

(A) Pharmacists shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order they dispense. If the pharmacist questions the accuracy or authenticity of a prescription drug order, he/she shall verify the order with the practitioner prior to dispensing.

(B) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that the prescription is a valid prescription. A pharmacist may not dispense a prescription drug unless the pharmacist complies with the requirements of §562.056 and §562.112 of the Act, and §291.29 of this title (relating to Professional Responsibility of Pharmacists).

(C) Subparagraph (B) of this paragraph does not prohibit a pharmacist from dispensing a prescription when a valid patient-practitioner relationship is not present in an emergency situation (e.g., a practitioner taking calls for the patient's regular practitioner).

(D) The owner of a Class A pharmacy shall have responsibility for ensuring its agents and employees engage in appropriate decisions regarding dispensing of valid prescriptions as set forth in §562.112 of the Act.

(2) Written prescription drug orders.

(A) Practitioner's signature.

(i) Dangerous drug prescription orders. Written prescription drug orders shall be:

(I) manually signed by the practitioner; or

(II) electronically signed by the practitioner using a system that electronically replicates the practitioner's manual signature on the written prescription, provided:

(-a-) that security features of the system require the practitioner to authorize each use; and

(-b-) the prescription is printed on paper that is designed to prevent unauthorized copying of a completed prescription and to prevent the erasure or modification of information written on the prescription by the prescribing practitioner. (For example, the paper contains security provisions against copying that results in some indication on the copy that it is a copy and therefore render the prescription null and void.)

(ii) Controlled substance prescription orders. Prescription drug orders for Schedules II, III, IV, or V controlled substances shall be manually signed by the practitioner. Prescription drug orders for Schedule II controlled substances shall be issued on an official prescription form as required by the Texas Controlled Substances Act, §481.075.

(iii) Other provisions for a practitioner's signature.

(I) A practitioner may sign a prescription drug order in the same manner as he would sign a check or legal document, e.g., J.H. Smith or John H. Smith.

(II) Rubber stamped signatures may not be used.

(III) The prescription drug order may not be signed by a practitioner's agent but may be prepared by an agent for the signature of a practitioner. However, the prescribing practitioner is responsible in case the prescription drug order does not conform in all essential respects to the law and regulations.

(B) Prescription drug orders written by practitioners in another state.

(i) Dangerous drug prescription orders. A pharmacist may dispense prescription drug orders for dangerous drugs issued by practitioners in a state other than Texas in the same manner as prescription drug orders for dangerous drugs issued by practitioners in Texas are dispensed.

(ii) Controlled substance prescription drug orders.

(I) A pharmacist may dispense prescription drug orders for Schedule II controlled substances issued by a practitioner in another state provided:

(-a-) the prescription is dispensed as specified in §315.9 of this title (relating to Pharmacy Responsibility - Out-of-State Practitioner - Effective September 1, 2016);

(-b-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule II controlled substances in such other state; and

(-c-) the prescription drug order is not dispensed after the end of the twenty-first day after the date on which the prescription is issued.

(II) A pharmacist may dispense prescription drug orders for controlled substances in Schedules III, IV, or V issued by a physician, dentist, veterinarian, or podiatrist in another state provided:

(-a-) the prescription drug order is issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal DEA registration number, and who may legally prescribe Schedules III, IV, or V controlled substances in such other state;

(-b-) the prescription drug order is not dispensed or refilled more than six months from the initial date of issuance and may not be refilled more than five times; and

(-c-) if there are no refill instructions on the original prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original prescription drug order have been dispensed, a new prescription drug order is obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(C) Prescription drug orders written by practitioners in the United Mexican States or the Dominion of Canada.

(i) Controlled substance prescription drug orders. A pharmacist may not dispense a prescription drug order for a Schedule II, III, IV, or V controlled substance issued by a practitioner in the Dominion of Canada or the United Mexican States.

(ii) Dangerous drug prescription drug orders. A pharmacist may dispense a dangerous drug prescription issued by a person licensed in the Dominion of Canada or the United Mexican States as a physician, dentist, veterinarian, or podiatrist provided:

(I) the prescription drug order is an original written prescription; and

(II) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of dangerous drugs.

(D) Prescription drug orders issued by an advanced practice registered nurse, physician assistant, or pharmacist.

(i) A pharmacist may dispense a prescription drug order that is:

(I) issued by an advanced practice registered nurse or physician assistant provided the advanced practice registered nurse or physician assistant is practicing in accordance with Subtitle B, Chapter 157, Occupations Code; and

(II) for a dangerous drug and signed by a pharmacist under delegated authority of a physician as specified in Subtitle B, Chapter 157, Occupations Code.

(ii) Each practitioner shall designate in writing the name of each advanced practice registered nurse or physician assistant authorized to issue a prescription drug order pursuant to Subtitle B, Chapter 157, Occupations Code. A list of the advanced practice registered nurses or physician assistants designated by the practitioner must be maintained in the practitioner's usual place of business. On request by a pharmacist, a practitioner shall furnish the pharmacist with a copy of the written authorization for a specific advanced practice registered nurse or physician assistant.

(E) Prescription drug orders for Schedule II controlled substances. No Schedule II controlled substance may be dispensed without a written prescription drug order of a practitioner on an official prescription form as required by the Texas Controlled Substances Act, §481.075.

(3) Verbal prescription drug orders.

(A) A verbal prescription drug order from a practitioner or a practitioner's designated agent may only be received by a pharmacist or a pharmacist-intern under the direct supervision of a pharmacist.

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to communicate prescriptions verbally for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense a verbal prescription drug order for a dangerous drug or a controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(4) Electronic prescription drug orders.

(A) Dangerous drug prescription orders.

(i) An electronic prescription drug order for a dangerous drug may be transmitted by a practitioner or a practitioner's designated agent:

(I) directly to a pharmacy; or

(II) through the use of a data communication device provided:

(-a-) the confidential prescription information is not altered during transmission; and

(-b-) confidential patient information is not accessed or maintained by the operator of the data communication device other than for legal purposes under federal and state law.

(ii) A practitioner shall designate in writing the name of each agent authorized by the practitioner to electronically transmit prescriptions for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a

copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(B) Controlled substance prescription orders. A pharmacist may only dispense an electronic prescription drug order for a Schedule II, III, IV, or V controlled substance in compliance with [the] federal and state laws and the rules of the Drug Enforcement Administration outlined in Part 1300 of the Code of Federal Regulations [and Texas Department of Public Safety].

(C) Prescriptions issued by a practitioner licensed in the Dominion of Canada or the United Mexican States. A pharmacist may not dispense an electronic prescription drug order for a dangerous drug or controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(5) Facsimile (faxed) prescription drug orders.

(A) A pharmacist may dispense a prescription drug order for a dangerous drug transmitted to the pharmacy by facsimile.

(B) A pharmacist may dispense a prescription drug order for a Schedule III-V controlled substance transmitted to the pharmacy by facsimile provided the prescription is manually signed by the practitioner and not electronically signed using a system that electronically replicates the practitioner's manual signature on the prescription drug order.

(C) A pharmacist may not dispense a facsimile prescription drug order for a dangerous drug or controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(6) Original prescription drug order records.

(A) Original prescriptions may be dispensed only in accordance with the prescriber's authorization as indicated on the original prescription drug order, including clarifications to the order given to the pharmacist by the practitioner or the practitioner's agent and recorded on the prescription.

(B) Notwithstanding subparagraph (A) of this paragraph, a pharmacist may dispense a quantity less than indicated on the original prescription drug order at the request of the patient or patient's agent.

(C) Original prescriptions shall be maintained by the pharmacy in numerical order and remain legible for a period of two years from the date of filling or the date of the last refill dispensed.

(D) If an original prescription drug order is changed, such prescription order shall be invalid and of no further force and effect; if additional drugs are to be dispensed, a new prescription drug order with a new and separate number is required. However, an original prescription drug order for a dangerous drug may be changed in accordance with paragraph (10) of this subsection relating to accelerated refills.

(E) Original prescriptions shall be maintained in three separate files as follows:

- (i) prescriptions for controlled substances listed in Schedule II;
- (ii) prescriptions for controlled substances listed in Schedules III-V; and
- (iii) prescriptions for dangerous drugs and nonprescription drugs.

(F) Original prescription records other than prescriptions for Schedule II controlled substances may be stored in a system that is capable of producing a direct image of the original prescription record, e.g., a digitalized imaging system. If original prescription records are stored in a direct imaging system, the following is applicable:

(i) the record of refills recorded on the original prescription must also be stored in this system;

(ii) the original prescription records must be maintained in numerical order and separated in three files as specified in subparagraph (D) of this paragraph; and

(iii) the pharmacy must provide immediate access to equipment necessary to render the records easily readable.

(7) Prescription drug order information.

(A) All original prescriptions shall bear:

(i) the name of the patient, or if such drug is for an animal, the species of such animal and the name of the owner;

(ii) the address of the patient;<sup>2</sup> provided, however, that a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(iii) the name, address and telephone number of the practitioner at the practitioner's usual place of business, legibly printed or stamped, and if for a controlled substance, the DEA registration number of the practitioner;

(iv) the name and strength of the drug prescribed;

(v) the quantity prescribed numerically, and if for a controlled substance:

(I) numerically, followed by the number written as a word, if the prescription is written;

(II) numerically, if the prescription is electronic;

or  
(III) if the prescription is communicated orally or telephonically, as transcribed by the receiving pharmacist;

(vi) directions for use;

(vii) the intended use for the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(viii) the date of issuance;

(ix) if a faxed prescription:

(I) a statement that indicates that the prescription has been faxed (e.g., Faxed to); and

(II) if transmitted by a designated agent, the name of the designated agent;

(x) if electronically transmitted:

(I) the date the prescription drug order was electronically transmitted to the pharmacy, if different from the date of issuance of the prescription; and

(II) if transmitted by a designated agent, the name of the designated agent; and

(xi) if issued by an advanced practice nurse or physician assistant in accordance with Subtitle B, Chapter 157, Occupations Code;

(I) the name, address, telephone number, and if the prescription is for a controlled substance, the DEA number of the supervising practitioner; and

(II) the address and telephone number of the clinic where the prescription drug order was carried out or signed; and

(xii) if communicated orally or telephonically:

(I) the initials or identification code of the transcribing pharmacist; and

(II) the name of the prescriber or prescriber's agent communicating the prescription information.

(B) At the time of dispensing, a pharmacist is responsible for documenting the following information on either the original hardcopy prescription or in the pharmacy's data processing system:

(i) the unique identification number of the prescription drug order;

(ii) the initials or identification code of the dispensing pharmacist;

(iii) the initials or identification code of the pharmacy technician or pharmacy technician trainee performing data entry of the prescription, if applicable;

(iv) the quantity dispensed, if different from the quantity prescribed;

(v) the date of dispensing, if different from the date of issuance; and

(vi) the brand name or manufacturer of the drug or biological product actually dispensed, if the drug was prescribed by generic name or interchangeable biological name or if a drug or interchangeable biological product other than the one prescribed was dispensed pursuant to the provisions of the Act, Chapters 562 and 563.

(C) Prescription drug orders may be utilized as authorized in Title 40, Part 1, Chapter 19 of the Texas Administrative Code.

(i) A prescription drug order is not required to bear the information specified in subparagraph (A) of this paragraph if the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital). Such prescription drug orders must contain the following information:

(I) the full name of the patient;

(II) the date of issuance;

(III) the name, strength, and dosage form of the drug prescribed;

(IV) directions for use; and

(V) the signature(s) required by 40 TAC §19.1506.

(ii) Prescription drug orders for dangerous drugs shall not be dispensed following one year after the date of issuance unless the authorized prescriber renews the prescription drug order.

(iii) Controlled substances shall not be dispensed pursuant to a prescription drug order under this subparagraph.

(8) Refills.

(A) General information.

(i) Refills may be dispensed only in accordance with the prescriber's authorization as indicated on the original prescription drug order except as authorized in paragraph (10) of this subsection relating to accelerated refills.

(ii) If there are no refill instructions on the original prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original prescription drug order have been dispensed, authorization from the prescribing practitioner shall be obtained prior to dispensing any refills and documented as specified in subsection (1) of this section.

(B) Refills of prescription drug orders for dangerous drugs or nonprescription drugs.

(i) Prescription drug orders for dangerous drugs or nonprescription drugs may not be refilled after one year from the date of issuance of the original prescription drug order.

(ii) If one year has expired from the date of issuance of an original prescription drug order for a dangerous drug or nonprescription drug, authorization shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of the drug.

(C) Refills of prescription drug orders for Schedules III-V controlled substances.

(i) Prescription drug orders for Schedules III-V controlled substances may not be refilled more than five times or after six months from the date of issuance of the original prescription drug order, whichever occurs first.

(ii) If a prescription drug order for a Schedule III, IV, or V controlled substance has been refilled a total of five times or if six months have expired from the date of issuance of the original prescription drug order, whichever occurs first, a new and separate prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(D) Pharmacist unable to contact prescribing practitioner. If a pharmacist is unable to contact the prescribing practitioner after a reasonable effort, a pharmacist may exercise his or her [his] professional judgment in refilling a prescription drug order for a drug, other than a Schedule II controlled substance, without the authorization of the prescribing practitioner, provided:

(i) failure to refill the prescription might result in an interruption of a therapeutic regimen or create patient suffering;

(ii) the quantity of prescription drug dispensed does not exceed a 72-hour supply;

(iii) the pharmacist informs the patient or the patient's agent at the time of dispensing that the refill is being provided without such authorization and that authorization of the practitioner is required for future refills;

(iv) the pharmacist informs the practitioner of the emergency refill at the earliest reasonable time;

(v) the pharmacist maintains a record of the emergency refill containing the information required to be maintained on a prescription as specified in this subsection;

(vi) the pharmacist affixes a label to the dispensing container as specified in §291.33(c)(7) of this title; and

(vii) if the prescription was initially filled at another pharmacy, the pharmacist may exercise his or her [his] professional judgment in refilling the prescription provided:

(I) the patient has the prescription container, label, receipt or other documentation from the other pharmacy that contains the essential information;

(II) after a reasonable effort, the pharmacist is unable to contact the other pharmacy to transfer the remaining prescription refills or there are no refills remaining on the prescription;

(III) the pharmacist, in his or her [his] professional judgment, determines that such a request for an emergency refill is appropriate and meets the requirements of clause (i) of this subparagraph; and

(IV) the pharmacist complies with the requirements of clauses (ii) - (vi) of this subparagraph.

(E) Natural or manmade disasters. If a natural or man-made disaster has occurred that prohibits the pharmacist from being able to contact the practitioner, a pharmacist may exercise his or her [his] professional judgment in refilling a prescription drug order for a drug, other than a Schedule II controlled substance, without the authorization of the prescribing practitioner, provided:

(i) failure to refill the prescription might result in an interruption of a therapeutic regimen or create patient suffering;

(ii) the quantity of prescription drug dispensed does not exceed a 30-day supply;

(iii) the governor has declared a state of disaster;

(iv) the board, through the executive director, has notified pharmacies that pharmacists may dispense up to a 30-day supply of prescription drugs;

(v) the pharmacist informs the patient or the patient's agent at the time of dispensing that the refill is being provided without such authorization and that authorization of the practitioner is required for future refills;

(vi) the pharmacist informs the practitioner of the emergency refill at the earliest reasonable time;

(vii) the pharmacist maintains a record of the emergency refill containing the information required to be maintained on a prescription as specified in this subsection;

(viii) the pharmacist affixes a label to the dispensing container as specified in §291.33(c)(7) of this title; and

(ix) if the prescription was initially filled at another pharmacy, the pharmacist may exercise his or her [his] professional judgment in refilling the prescription provided:

(I) the patient has the prescription container, label, receipt or other documentation from the other pharmacy that contains the essential information;

(II) after a reasonable effort, the pharmacist is unable to contact the other pharmacy to transfer the remaining prescription refills or there are no refills remaining on the prescription;

(III) the pharmacist, in his or her [his] professional judgment, determines that such a request for an emergency refill is appropriate and meets the requirements of clause (i) of this subparagraph; and

(IV) the pharmacist complies with the requirements of clauses (ii) - (viii) of this subparagraph.

(F) Auto-Refill Programs. A pharmacy may use a program that automatically refills prescriptions that have existing refills available in order to improve patient compliance with and adherence

to prescribed medication therapy. The following is applicable in order to enroll patients into an auto-refill program.

(i) Notice of the availability of an auto-refill program shall be given to the patient or patient's agent, and the patient or patient's agent must affirmatively indicate that they wish to enroll in such a program and the pharmacy shall document such indication.

(ii) The patient or patient's agent shall have the option to withdraw from such a program at any time.

(iii) Auto-refill programs may be used for refills of dangerous drugs, and Schedules IV and V controlled substances. Schedules II and III controlled substances may not be dispensed by an auto-refill program.

(iv) As is required for all prescriptions, a drug regimen review shall be completed on all prescriptions filled as a result of the auto-refill program. Special attention shall be noted for drug regimen review warnings of duplication of therapy and all such conflicts shall be resolved with the prescribing practitioner prior to refilling the prescription.

(9) Records Relating to Dispensing Errors. If a dispensing error occurs, the following is applicable.

(A) Original prescription drug orders:

(i) shall not be destroyed and must be maintained in accordance with subsection (a) of this section; and

(ii) shall not be altered. Altering includes placing a label or any other item over any of the information on the prescription drug order (e.g., a dispensing tag or label that is affixed to back of a prescription drug order must not be affixed on top of another dispensing tag or label in such a manner as to obliterate the information relating to the error).

(B) Prescription drug order records maintained in a data processing system:

(i) shall not be deleted and must be maintained in accordance with subsection (a) of this section;

(ii) may be changed only in compliance with subsection (e)(2)(B) of this section; and

(iii) if the error involved incorrect data entry into the pharmacy's data processing system, this record must be either voided or cancelled in the data processing system, so that the incorrectly entered prescription drug order may not be dispensed, or the data processing system must be capable of maintaining an audit trail showing any changes made to the data in the system.

(10) Accelerated refills. In accordance with §562.0545 of the Act, a pharmacist may dispense up to a 90-day supply of a dangerous drug pursuant to a valid prescription that specifies the dispensing of a lesser amount followed by periodic refills of that amount if:

(A) the total quantity of dosage units dispensed does not exceed the total quantity of dosage units authorized by the prescriber on the original prescription, including refills;

(B) the patient consents to the dispensing of up to a 90-day supply and the physician has been notified electronically or by telephone;

(C) the physician has not specified on the prescription that dispensing the prescription in an initial amount followed by periodic refills is medically necessary;

(D) the dangerous drug is not a psychotropic drug used to treat mental or psychiatric conditions; and

(E) the patient is at least 18 years of age.

(c) Patient medication records.

(1) A patient medication record system shall be maintained by the pharmacy for patients to whom prescription drug orders are dispensed.

(2) The patient medication record system shall provide for the immediate retrieval of information for the previous 12 months that is necessary for the dispensing pharmacist to conduct a prospective drug regimen review at the time a prescription drug order is presented for dispensing.

(3) The pharmacist-in-charge shall assure that a reasonable effort is made to obtain and record in the patient medication record at least the following information:

(A) full name of the patient for whom the drug is prescribed;

(B) address and telephone number of the patient;

(C) patient's age or date of birth;

(D) patient's gender;

(E) any known allergies, drug reactions, idiosyncrasies, and chronic conditions or disease states of the patient and the identity of any other drugs currently being used by the patient which may relate to prospective drug regimen review;

(F) pharmacist's comments relevant to the individual's drug therapy, including any other information unique to the specific patient or drug; and

(G) a list of all prescription drug orders dispensed (new and refill) to the patient by the pharmacy during the last two years. Such lists shall ~~shall~~ contain the following information:

(i) date dispensed;

(ii) name, strength, and quantity of the drug dispensed;

(iii) prescribing practitioner's name;

(iv) unique identification number of the prescription; and

(v) name or initials of the dispensing pharmacists.

(4) A patient medication record shall be maintained in the pharmacy for two years. If patient medication records are maintained in a data processing system, all of the information specified in this subsection shall be maintained in a retrievable form for two years and information for the previous 12 months shall be maintained online ~~on-line~~. A patient medication record must contain documentation of any modification, change, or manipulation to a patient profile.

(5) Nothing in this subsection shall be construed as requiring a pharmacist to obtain, record, and maintain patient information other than prescription drug order information when a patient or patient's agent refuses to provide the necessary information for such patient medication records.

(d) Prescription drug order records maintained in a manual system.

(1) Original prescriptions shall be maintained in three files as specified in subsection (b)(6)(D) of this section.

(2) Refills.

(A) Each time a prescription drug order is refilled, a record of such refill shall be made:

(i) on the back of the prescription by recording the date of dispensing, the written initials or identification code of the dispensing pharmacist, the initials or identification code of the pharmacy technician or pharmacy technician trainee preparing the prescription label, if applicable, and the amount dispensed. (If the pharmacist merely initials and dates the back of the prescription drug order, he or she shall be deemed to have dispensed a refill for the full face amount of the prescription drug order); or

(ii) on another appropriate, uniformly maintained, readily retrievable record, such as medication records, that indicates by patient name the following information:

(I) unique identification number of the prescription;

(II) name and strength of the drug dispensed;

(III) date of each dispensing;

(IV) quantity dispensed at each dispensing;

(V) initials or identification code of the dispensing pharmacist;

(VI) initials or identification code of the pharmacy technician or pharmacy technician trainee preparing the prescription label, if applicable; and

(VII) total number of refills for the prescription.

(B) If refill records are maintained in accordance with subparagraph (A)(ii) of this paragraph, refill records for controlled substances in Schedules III-V shall be maintained separately from refill records of dangerous drugs and nonprescription drugs.

(3) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted on the original prescription, in addition to the documentation of dispensing the refill as specified in subsection (l) of this section.

(4) Each time a modification, change, or manipulation is made to a record of dispensing, documentation of such change shall be recorded on the back of the prescription or on another appropriate, uniformly maintained, readily retrievable record, such as medication records. The documentation of any modification, change, or manipulation to a record of dispensing shall include the identification of the individual responsible for the alteration.

(e) Prescription drug order records maintained in a data processing system.

(1) General requirements for records maintained in a data processing system.

(A) Compliance with data processing system requirements. If a Class A pharmacy's data processing system is not in compliance with this subsection, the pharmacy must maintain a manual record keeping system as specified in subsection (d) of this section.

(B) Original prescriptions. Original prescriptions shall be maintained in three files as specified in subsection (b)(6)(D) of this section.

(C) Requirements for backup systems.

(i) The pharmacy shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a reg-

ular basis, at least monthly, to assure that data is not lost due to system failure.

(ii) Data processing systems shall have a workable (electronic) data retention system that can produce an audit trail of drug usage for the preceding two years as specified in paragraph (2)(H) of this subsection.

(D) Change or discontinuance of a data processing system.

(i) Records of dispensing. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records of dispensing to the new data processing system; or

(II) purge the records of dispensing to a printout that contains the same information required on the daily printout as specified in paragraph (2)(C) of this subsection. The information on this hard copy printout shall be sorted and printed by prescription number and list each dispensing for this prescription chronologically.

(ii) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records to the new data processing system; or

(II) purge the records to a printout that contains all of the information required on the original document.

(iii) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(E) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

## (2) Records of dispensing.

(A) Each time a prescription drug order is filled or refilled, a record of such dispensing shall be entered into the data processing system.

(B) Each time a modification, change or manipulation is made to a record of dispensing, documentation of such change shall be recorded in the data processing system. The documentation of any modification, change, or manipulation to a record of dispensing shall include the identification of the individual responsible for the alteration. Should the data processing system not be able to record a modification, change, or manipulation to a record of dispensing, the information should be clearly documented on the hard copy prescription.

(C) The data processing system shall have the capacity to produce a daily hard copy printout of all original prescriptions dispensed and refilled. This hard copy printout shall contain the following information:

(i) unique identification number of the prescription;

(ii) date of dispensing;

(iii) patient name;

(iv) prescribing practitioner's name<sup>[§]</sup> and the supervising physician's name if the prescription was issued by an advanced practice registered nurse, physician assistant or pharmacist;

(v) name and strength of the drug product actually dispensed; if generic name, the brand name or manufacturer of drug dispensed;

(vi) quantity dispensed;

(vii) initials or an identification code of the dispensing pharmacist;

(viii) initials or an identification code of the pharmacy technician or pharmacy technician trainee performing data entry of the prescription, if applicable;

(ix) if not immediately retrievable via computer display, the following shall also be included on the hard copy printout:

(I) patient's address;

(II) prescribing practitioner's address;

(III) practitioner's DEA registration number, if the prescription drug order is for a controlled substance;

(IV) quantity prescribed, if different from the quantity dispensed;

(V) date of issuance of the prescription drug order, if different from the date of dispensing; and

(VI) total number of refills dispensed to date for that prescription drug order; and

(x) any changes made to a record of dispensing.

(D) The daily hard copy printout shall be produced within 72 hours of the date on which the prescription drug orders were dispensed and shall be maintained in a separate file at the pharmacy. Records of controlled substances shall be readily retrievable from records of non-controlled substances.

(E) Each individual pharmacist who dispenses or refills a prescription drug order shall verify that the data indicated on the daily hard copy printout is correct, by dating and signing such document in the same manner as signing a check or legal document (e.g., J.H. Smith, or John H. Smith) within seven days from the date of dispensing.

(F) In lieu of the printout described in subparagraph (C) of this paragraph, the pharmacy shall maintain a log book in which each individual pharmacist using the data processing system shall sign a statement each day, attesting to the fact that the information entered into the data processing system that day has been reviewed by him or her and is correct as entered. Such log book shall be maintained at the pharmacy employing such a system for a period of two years after the date of dispensing; provided, however, that the data processing system can produce the hard copy printout on demand by an authorized agent of the Texas State Board of Pharmacy. If no printer is available on site, the hard copy printout shall be available within 72 hours with a certification by the individual providing the printout, stating [that states] that the printout is true and correct as of the date of entry and such information has not been altered, amended, or modified.

(G) The pharmacist-in-charge is responsible for the proper maintenance of such records, for ensuring ~~and responsible~~ that such data processing system can produce the records outlined in this section, and that such system is in compliance with this subsection.

(H) The data processing system shall be capable of producing a hard copy printout of an audit trail for all dispensing [dispensings] (original and refill) of any specified strength and dosage form of a drug (by either brand or generic name or both) during a specified time period.

(i) Such audit trail shall contain all of the information required on the daily printout as set out in subparagraph (C) of this paragraph.



(ii) The audit trail required in this subparagraph shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy.

(I) Failure to provide the records set out in this subsection, either on site or within 72 hours constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(J) The data processing system shall provide online [~~on-line~~] retrieval (via computer display or hard copy printout) of the information set out in subparagraph (C) of this paragraph of:

(i) the original controlled substance prescription drug orders currently authorized for refilling; and

(ii) the current refill history for Schedules III, IV, and V controlled substances for the immediately preceding six-month period.

(K) In the event that a pharmacy using [~~that uses~~] a data processing system experiences system downtime, the following is applicable:

(i) an auxiliary procedure shall ensure that refills are authorized by the original prescription drug order and that the maximum number of refills has not been exceeded, or authorization from the prescribing practitioner shall be obtained prior to dispensing a refill; and

(ii) all of the appropriate data shall be retained for online [~~on-line~~] data entry as soon as the system is available for use again.

(3) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted as follows:

(A) on the hard copy prescription drug order;

(B) on the daily hard copy printout; or

(C) via the computer display.

(f) Limitation to one type of recordkeeping system. When filing prescription drug order information a pharmacy may use only one of the two systems described in subsection (d) or (e) of this section.

(g) Transfer of prescription drug order information. For the purpose of initial or refill dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements.

(1) The transfer of original prescription drug order information for controlled substances listed in Schedules [~~Schedule~~] III, IV, or V for the purpose of refill dispensing is permissible between pharmacies on a one-time basis only. However, pharmacies electronically sharing a real-time, online [~~on-line~~] database may transfer up to the maximum refills permitted by law and the prescriber's authorization.

(2) The transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills.

(3) The transfer is communicated orally by telephone or via facsimile directly by a pharmacist to another pharmacist<sub>1</sub> by a pharmacist to a pharmacist-intern<sub>1</sub> or by a pharmacist-intern to another pharmacist.

(4) Both the original and the transferred prescription drug orders are maintained for a period of two years from the date of last refill.

(5) The individual transferring the prescription drug order information shall [~~ensure the following occurs~~]:

(A) write the word "void" on the face of the invalidated prescription or the prescription is voided in the data processing system;

(B) record the name, address, and if for a controlled substance, the DEA registration number of the pharmacy to which it was transferred, and the name of the receiving individual on the reverse of the invalidated prescription or stored with the invalidated prescription drug order in the data processing system;

(C) record the date of the transfer and the name of the individual transferring the information; and

(D) if the prescription is transferred electronically, provide the following information:

(i) date of original dispensing and prescription number;

(ii) number of refills remaining and if a controlled substance, the date(s) and location(s) of previous refills;

(iii) name, address, and if a controlled substance, the DEA registration number of the transferring pharmacy;

(iv) name of the individual transferring the prescription; and

(v) if a controlled substance, the name, address, [~~and~~] DEA registration number, and prescription number from the pharmacy that originally dispensed the prescription, if different.

(6) The individual receiving the transferred prescription drug order information shall:

(A) write the word "transfer" on the face of the prescription or indicate in the prescription record that [~~indicates~~] the prescription was a transfer; and

(B) reduce to writing all of the information required to be on a prescription as specified in subsection (b)(7) of this section (relating to Prescriptions)<sub>2</sub> and [~~including~~] the following [~~information~~];

(i) date of issuance and prescription number;

(ii) original number of refills authorized on the original prescription drug order;

(iii) date of original dispensing;

(iv) number of valid refills remaining, and if a controlled substance, the date(s) and location(s) of previous refills;

(v) name, address, and if for a controlled substance, the DEA registration number of the transferring pharmacy;

(vi) name of the individual transferring the prescription; and

(vii) name, address, and if for a controlled substance, the DEA registration number, of the pharmacy that originally dispensed the prescription, if different; or

(C) if the prescription is transferred electronically, create an electronic record for the prescription that includes the receiving pharmacist's name and all of the information transferred with the prescription including all of the information required to be on a prescription as specified in subsection (b)(7) of this section (relating to Prescriptions)<sub>2</sub> and the following:

(i) date of original dispensing;

(ii) number of refills remaining and if a controlled substance, the prescription number(s), date(s) and location(s) of previous refills;

(iii) name, address, and if for a controlled substance, the DEA registration number;

(iv) name of the individual transferring the prescription; and

(v) name, address, and if for a controlled substance, the DEA registration number, of the pharmacy that originally filled the prescription.

(7) Both the individual transferring the prescription and the individual receiving the prescription must engage in confirmation of the prescription information by such means as:

(A) the transferring individual faxes the hard copy prescription to the receiving individual; or

(B) the receiving individual repeats the verbal information from the transferring individual and the transferring individual verbally confirms that the repeated information is correct.

(8) Pharmacies transferring prescriptions electronically shall comply with the following:

(A) Prescription drug orders may not be transferred by non-electronic means during periods of downtime except on consultation with and authorization by a prescribing practitioner; provided, however, that during downtime, a hard copy of a prescription drug order may be made available for informational purposes only, to the patient or a pharmacist, and the prescription may be read to a pharmacist by telephone;[-]

(B) The original prescription drug order shall be invalidated in the data processing system for purposes of filling or refilling, but shall be maintained in the data processing system for refill history purposes;[-];

(C) If the data processing system does not have the capacity to store all the information as specified in paragraphs (5) and (6) of this subsection, the pharmacist is required to record this information on the original or transferred prescription drug order;[-]

(D) The data processing system shall have a mechanism to prohibit the transfer or refilling of controlled substance prescription drug orders that have been previously transferred; and[-]

(E) Pharmacies electronically accessing the same prescription drug order records may electronically transfer prescription information if the following requirements are met;[-]

(i) The original prescription is voided and the pharmacies' data processing systems [shall] store all the information as specified in paragraphs (5) and (6) of this subsection;[-]

(ii) Pharmacies not owned by the same entity may electronically access the same prescription drug order records, provided the owner, chief executive officer, or designee of each pharmacy signs an agreement allowing access to such prescription drug order records; and[-]

(iii) An electronic transfer between pharmacies may be initiated by a pharmacist intern, pharmacy technician, or pharmacy technician trainee acting under the direct supervision of a pharmacist.

(9) An individual may not refuse to transfer original prescription information to another individual who is acting on behalf of a patient and who is making a request for this information as specified in this subsection. The transfer of original prescription information must be completed within four business hours of the request.

(10) When transferring a compounded prescription, a pharmacy is required to provide all of the information regarding the

compounded preparation, including the formula, unless the formula is patented or otherwise protected, in which case, the transferring pharmacy shall, at a minimum, provide the quantity or strength of all of the active ingredients of the compounded preparation.

(11) The electronic transfer of multiple or bulk prescription records between two pharmacies is permitted provided:

(A) a record of the transfer as specified in paragraph (5) of this subsection is maintained by the transferring pharmacy;

(B) the information specified in paragraph (6) of this subsection is maintained by the receiving pharmacy; and

(C) in the event that the patient or patient's agent is unaware of the transfer of the prescription drug order record, the transferring pharmacy must notify the patient or patient's agent of the transfer and must provide the patient or patient's agent with the telephone number of the pharmacy receiving the multiple or bulk prescription drug order records.

(h) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(1) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(2) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed and distributed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(3) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained that indicates:

(A) the actual date of distribution;

(B) the name, strength, and quantity of controlled substances distributed;

(C) the name, address, and DEA registration number of the distributing pharmacy; and

(D) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(4) If the distribution is for a Schedule II controlled substance, the following is applicable;[-]

(A) The pharmacy, practitioner, or other registrant who is receiving the controlled substances shall issue Copy 1 and Copy 2 of a DEA order form (DEA 222) to the distributing pharmacy; and[-]

(B) The distributing pharmacy shall:

(i) complete the area on the DEA order form (DEA 222) titled "To Be Filled in by Supplier";

(ii) maintain Copy 1 of the DEA order form (DEA 222) at the pharmacy for two years; and

(iii) forward Copy 2 of the DEA order form (DEA 222) to the Divisional Office of the Drug Enforcement Administration.

(i) Other records. Other records to be maintained by a pharmacy:

(1) a log of the initials or identification codes that [will] identify each pharmacist, pharmacy technician, and pharmacy technician trainee who is involved in the dispensing process[.] in the pharmacy's data processing system (the initials or identification code shall be unique to ensure that each individual can be identified, i.e., identical initials or identification codes shall not be used). Such log shall be maintained at the pharmacy for at least seven years from the date of the transaction;

(2) copy 3 of DEA order forms (DEA 222) that have been properly dated, initialed, and filed, [and] all copies of each unaccepted or defective order form and any attached statements or other documents, and/or for each order filled using the DEA Controlled Substance Ordering System (CSOS), the original signed order and all linked records for that order;

(3) a copy of the power of attorney to sign DEA 222 order forms (if applicable);

(4) suppliers' invoices of dangerous drugs and controlled substances; a pharmacist shall verify that the controlled substances [drugs] listed on the invoices were actually received by clearly recording his/her initials and the actual date of receipt of the controlled substances;

(5) suppliers' credit memos for controlled substances and dangerous drugs;

(6) a copy of inventories required by §291.17 of this title (relating to Inventory Requirements);

(7) reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(8) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(9) a copy of any notification required by the Texas Pharmacy Act or the sections in this chapter, including, but not limited to, the following:

(A) reports of theft or significant loss of controlled substances to the DEA and the board;

(B) notifications of a change in pharmacist-in-charge of a pharmacy; and

(C) reports of a fire or other disaster that may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(j) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(1) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met:[.]

(A) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by Title 21, Code of Federal Regulations, §1304.04(a), and submits a copy of this written notification to the board [Texas State Board of Pharmacy]. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director;[.]

(B) The pharmacy maintains a copy of the notification required in subparagraph (A) of this paragraph; and[.]

(C) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories that shall be maintained at the pharmacy;[.]

(2) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location;[.]

(3) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records; and[.]

(4) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(k) Ownership of pharmacy records. For the purposes of these sections, a pharmacy licensed under the Act is the only entity that may legally own and maintain prescription drug records.

(l) Documentation of consultation. When a pharmacist consults a prescriber as described in this section, the pharmacist shall document such occurrences on the hard copy or in the pharmacy's data processing system associated with the prescription [such occurrences] and shall include the following information:

(1) date the prescriber was consulted;

(2) name of the person communicating the prescriber's instructions;

(3) any applicable information pertaining to the consultation; and

(4) initials or identification code of the pharmacist performing the consultation clearly recorded for the purpose of identifying the pharmacist who performed the consultation if the information is recorded on the hard copy prescription.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

TRD-201904915

Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 305-8010



## CHAPTER 295. PHARMACISTS

### 22 TAC §295.9

The Texas State Board of Pharmacy proposes amendments to §295.9, concerning Inactive License. The amendments, if adopted, add a requirement for one hour of continuing education on pain management as specified in section 481.0764 of the Texas Controlled Substances Act, and remove a requirement for one hour of continuing education on opioid abuse.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be increased awareness and education amongst the pharmacist community. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

- (1) The proposed amendments do not create or eliminate a government program;
- (2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;
- (3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;
- (4) The proposed amendments do not require an increase or decrease in fees paid to the agency;
- (5) The proposed amendments do not create a new regulation;
- (6) The proposed amendments both expand and limit an existing regulation by replacing a continuing education requirement;
- (7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and
- (8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

*§295.9. Inactive License.*

(a) Placing a license on inactive status. A person who is licensed by the board to practice pharmacy but who is not eligible to renew the license for failure to comply with the continuing education requirements of the Act, Chapter 559, Subchapter A, and who is not engaged in the practice of pharmacy in this state, may place the license on inactive status at the time of license renewal or during a license period as follows:

(1) To place a license on inactive status at the time of renewal, the licensee shall:

(A) complete and submit before the expiration date a pharmacist license renewal application provided by the board;

(B) state on the renewal application that the license is to be placed on inactive status and that the licensee shall not practice pharmacy in Texas while the license is inactive; and

(C) pay the fee for renewal of the license as specified in §295.5 of this title (relating to Pharmacist License or Renewal Fees).

(2) To place a license on inactive status at a time other than the time of license renewal, the licensee shall:

(A) return the current renewal certificate to the board;

(B) submit a signed statement stating that the licensee shall not practice pharmacy in Texas while the license is inactive, and the date the license is to be placed on inactive status; and

(C) pay the fee for issuance of an amended license as specified in §295.5(e) of this title (relating to Pharmacist License or Renewal Fees).

(b) Prohibition against practicing pharmacy in Texas with an inactive license. A holder of a license that is on inactive status shall not practice pharmacy in this state. The practice of pharmacy by a holder of a license that is on inactive status constitutes the practice of pharmacy without a license.

(c) Reactivation of an inactive license.

(1) A holder of a license that is on inactive status may return the license to active status by:

(A) applying for active status on a form prescribed by the board;

(B) providing copies of completion certificates from approved continuing education programs as specified in §295.8(e) of this title (relating to Continuing Education Requirements) for 30 hours including at least one contact hour (0.1 CEU) shall be related to Texas pharmacy laws or rules and, for applications received before September 1, 2023, at least one contact hour (0.1 CEU) shall be related to best practices, alternative treatment options, and multi-modal approaches to pain management as specified in §481.0764 of the Texas Health and Safety Code [and at least one contact hour (0.1 CEU) shall be related to opioid abuse]. Approved continuing education earned within two years prior to the licensee applying for the return to active status may be applied toward the continuing education requirement for reactivation of the license but may not be counted toward subsequent renewal of the license; and

(C) paying the fee specified in paragraph (2) of this subsection.

(2) If the application for reactivation of the license is made at the time of license renewal, the applicant shall pay the license renewal fee specified in §295.5 of this title (relating to Pharmacist License or Renewal Fees). If the application for reactivation of the license is made at a time other than the time of license renewal, the applicant shall pay the fee for issuance of an amended license to practice pharmacy as specified in §295.5(e) of this title (relating to Pharmacist License or Renewal Fees).

(3) In an emergency caused by a natural or manmade disaster or any other exceptional situation that causes an extraordinary demand for pharmacist services, the executive director of the board, in his/her discretion, may allow a pharmacist whose license has been inactive for no more than two years to reactivate their license prior to obtaining the required continuing education specified in paragraph (1)(B) of this subsection, provided the pharmacist completes the continuing education requirement within six months of reactivation of the license. If the required continuing education is not provided within six months, the license shall return to an inactive status.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

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Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 305-8010



## 22 TAC §295.13

The Texas State Board of Pharmacy proposes amendments to §295.13, concerning Drug Therapy Management by a Pharmacist under Written Protocol of a Physician. The amendments, if adopted, specify the circumstances under which physician delegation to a pharmacist of specific acts of drug therapy management may occur, in accordance with Senate Bill 1056.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules regarding the circumstances under which a physician may delegate to a pharmacist specific acts of drug therapy management. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

- (1) The proposed amendments do not create or eliminate a government program;
- (2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;
- (3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;
- (4) The proposed amendments do not require an increase or decrease in fees paid to the agency;
- (5) The proposed amendments do not create a new regulation;
- (6) The proposed amendments do limit an existing regulation in order to be consistent with state law;
- (7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and
- (8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State

Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

*§295.13. Drug Therapy Management by a Pharmacist under Written Protocol of a Physician.*

(a) Purpose. The purpose of this section is to provide standards for the maintenance of records of a pharmacist engaged in the provision of drug therapy management as authorized in Chapter 157 of the Medical Practice Act and §554.005 of the Act.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Pharmacy Act, Chapter 551 - 566 and 568 - 569, Occupations Code, as amended.

(2) Board--The Texas State Board of Pharmacy.

(3) Confidential record--Any health-related record maintained by a pharmacy or pharmacist, such as a patient medication record, prescription drug order, or medication order.

(4) Drug therapy management--The performance of specific acts by pharmacists as authorized by a physician through written protocol. Drug therapy management does not include the selection of drug products not prescribed by the physician, unless the drug product is named in the physician initiated protocol or the physician initiated record of deviation from a standing protocol. Drug therapy management may include the following:

(A) collecting and reviewing patient drug use histories;

(B) ordering or performing routine drug therapy related patient assessment procedures including temperature, pulse, and respiration;

(C) ordering drug therapy related laboratory tests;

(D) implementing or modifying drug therapy following diagnosis, initial patient assessment, and ordering of drug therapy by a physician as detailed in the protocol; or

(E) any other drug therapy related act delegated by a physician.

(5) Medical Practice Act--The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended.

(6) Written protocol--A physician's order, standing medical order, standing delegation order, or other order or protocol as defined by rule of the Texas Medical Board under the Medical Practice Act.

(A) A written protocol must contain at a minimum the following:

(i) a statement identifying the individual physician authorized to prescribe drugs and responsible for the delegation of drug therapy management;

(ii) a statement identifying the individual pharmacist authorized to dispense drugs and to engage in drug therapy management as delegated by the physician;

(iii) a statement identifying the types of drug therapy management decisions that the pharmacist is authorized to make which shall include:

(I) a statement of the ailments or diseases involved, drugs, and types of drug therapy management authorized; and

(II) a specific statement of the procedures, decision criteria, or plan the pharmacist shall follow when exercising drug therapy management authority;

(iv) a statement of the activities the pharmacist shall follow in the course of exercising drug therapy management authority, including the method for documenting decisions made and a plan for communication or feedback to the authorizing physician concerning specific decisions made. Documentation shall be recorded within a reasonable time of each intervention and may be performed on the patient medication record, patient medical chart, or in a separate log book; and

(v) a statement that describes appropriate mechanisms and time schedule for the pharmacist to report to the physician monitoring the pharmacist's exercise of delegated drug therapy management and the results of the drug therapy management.

(B) A standard protocol may be used or the attending physician may develop a drug therapy management protocol for the individual patient. If a standard protocol is used, the physician shall record what deviations, if any, from the standard protocol are ordered for that patient.

(c) Physician delegation to a pharmacist.

(1) As specified in Chapter 157 of the Texas Medical Practices Act, a physician may delegate to a properly qualified and trained pharmacist acting under adequate physician supervision the performance of specific acts of drug therapy management authorized by the physician through the physician's order, standing medical order, standing delegation order, or other order or protocol.

(2) A delegation under paragraph (1) of this subsection may include:

(A) the implementation or modification of a patient's drug therapy under a protocol, if:

(i) the delegation follows a diagnosis, initial patient assessment, and drug therapy order by the physician; and

(ii) the pharmacist maintains a copy of the protocol for inspection until at least the seventh anniversary of the expiration date of the protocol; or

(B) [~~including~~] the authority to sign a prescription drug order for dangerous drugs, if:

(i) [(A)] the delegation follows a diagnosis, initial patient assessment, and drug therapy order by the physician;

(ii) [(B)] the pharmacist practices in a federally qualified health center, hospital, hospital-based clinic, or an academic health care institution; and

(iii) [(C)] the federally qualified health center, hospital, hospital-based clinic, or academic health care institution in which the pharmacist practices has bylaws and a medical staff policy that permit a physician to delegate to a pharmacist the management of a patient's drug therapy.

(3) A pharmacist who signs a prescription for a dangerous drug under authority granted under paragraph (2) of this subsection shall:

(A) notify the board that a physician has delegated the authority to sign a prescription for dangerous drugs. Such notification shall:

(i) be made on an application provided by the board;

(ii) occur prior to signing any prescription for a dangerous drug;

(iii) be updated annually; and

(iv) include a copy of the written protocol.

(B) include the pharmacist's name, address, and telephone number as well as the name, address, and telephone number of the delegating physician on each prescription for a dangerous drug signed by the pharmacist.

(4) The board shall post the following information on its web-site:

(A) the name and license number of each pharmacist who has notified the board that a physician has delegated authority to sign a prescription for a dangerous drug;

(B) the name and address of the physician who delegated the authority to the pharmacist; and

(C) the expiration date of the protocol granting the authority to sign a prescription.

(d) Pharmacist Training Requirements.

(1) Initial requirements. A pharmacist shall maintain and provide to the Board within 24 hours of request a statement attesting to the fact that the pharmacist has within the last year:

(A) completed at least six hours of continuing education related to drug therapy offered by a provider approved by the Accreditation Council for Pharmacy Education (ACPE); or

(B) engaged in drug therapy management as allowed under previous laws or rules. A statement from the physician supervising the acts shall be sufficient documentation.

(2) Continuing requirements. A pharmacist engaged in drug therapy management shall annually complete six hours of continuing education related to drug therapy offered by a provider approved by the Accreditation Council for Pharmacy Education (ACPE). (These hours may be applied towards the hours required for renewal of a license to practice pharmacy.)

(e) Supervision. Physician supervision shall be as specified in the Medical Practice Act, Chapter 157 and shall be considered adequate if the delegating physician:

(1) is responsible for the formulation or approval of the written protocol and any patient-specific deviations from the protocol and review of the written protocol and any patient-specific deviations from the protocol at least annually and the services provided to a patient under the protocol on a schedule defined in the written protocol;

(2) has established and maintains a physician-patient relationship with each patient provided drug therapy management by a delegated pharmacist and informs the patient that drug therapy will be managed by a pharmacist under written protocol;

(3) is geographically located so as to be able to be physically present daily to provide medical care and supervision;

(4) receives, on a schedule defined in the written protocol, a periodic status report on the patient, including any problem or complication encountered;

(5) is available through direct telecommunication for consultation, assistance, and direction; and

(6) determines that the pharmacist to whom the physician is delegating drug therapy management establishes and maintains a pharmacist-patient relationship with the patient.

(f) Records.

(1) Maintenance of records.

(A) Every record required to be kept under this section shall be kept by the pharmacist and be available, for at least two years from the date of such record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement or regulatory agencies.

(B) Records may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(i) the records maintained in the alternative system contain all of the information required on the manual record; and

(ii) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(2) Written protocol.

(A) A copy of the written protocol and any patient-specific deviations from the protocol shall be maintained by the pharmacist.

(B) A pharmacist shall document all interventions undertaken under the written protocol within a reasonable time of each intervention. Documentation may be maintained in the patient medication record, patient medical chart, or in a separate log.

(C) A standard protocol may be used or the attending physician may develop a drug therapy management protocol for the individual patient. If a standard protocol is used, the physician shall record what deviations, if any, from the standard protocol are ordered for that patient. A pharmacist shall maintain a copy of any deviations from the standard protocol ordered by the physician.

(D) Written protocols, including standard protocols, any patient-specific deviations from a standard protocol, and any individual patient protocol, shall be reviewed by the physician and pharmacist at least annually and revised if necessary. Such review shall be documented in the pharmacist's records. Documentation of all services provided to the patient by the pharmacist shall be reviewed by the physician on the schedule established in the protocol.

(g) Confidentiality.

(1) In addition to the confidentiality requirements specified in §291.27 of this title (relating to Confidentiality) a pharmacist shall comply with:

(A) the privacy provisions of the federal Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and any rules adopted pursuant to this act;

(B) the requirements of Medical Records Privacy contained in Chapter 181, Health and Safety Code;

(C) the Privacy of Health Information requirements contained in Chapter 28B of the Insurance Code; and

(D) any other confidentiality provisions of federal or state laws.

(2) This section shall not affect or alter the provisions relating to the confidentiality of the physician-patient communication as specified in the Medical Practice Act, Chapter 159.

(h) Construction and Interpretation.

(1) As specified in the Medical Practice Act, Chapter 157, this section does not restrict the use of a pre-established health care program or restrict a physician from authorizing the provision of patient care by use of a pre-established health care program if the patient is institutionalized and the care is to be delivered in a licensed hospital with an organized medical staff that has authorized standing delegation orders, standing medical orders, or protocols.

(2) As specified in the Medical Practice Act, Chapter 157, this section may not be construed to limit, expand, or change any provision of law concerning or relating to therapeutic drug substitution or administration of medication, including the Act, §554.004.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2019.

TRD-201904916

Allison Vordenbaumen Benz, R. Ph., M.S.

Executive Director

Texas State Board of Pharmacy

Earliest possible date of adoption: February 2, 2020

For further information, please call: (512) 305-8010



## CHAPTER 315. CONTROLLED SUBSTANCES

### 22 TAC §315.3

The Texas State Board of Pharmacy proposes amendments to §315.3, concerning Prescriptions - Effective September 1, 2016. The amendments, if adopted, remove the effective date from the short title and add a requirement for a person dispensing a Schedule II controlled substance prescription to provide written notice on the safe disposal of controlled substance prescription drugs, in accordance with House Bill 2088.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clearer regulatory language and consistency between state law and Board rules regarding notice requirements for Schedule II controlled substance prescription drugs. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Ms. Benz has determined the following:

- (1) The proposed amendments do not create or eliminate a government program;
- (2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions;
- (3) Implementation of the proposed amendments does not require an increase or decrease in the future legislative appropriations to the agency;
- (4) The proposed amendments do not require an increase or decrease in fees paid to the agency;
- (5) The proposed amendments do not create a new regulation;
- (6) The proposed amendments do expand an existing regulation in order to be consistent with state law;
- (7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and
- (8) The proposed amendments do not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

#### §315.3. Prescriptions.

##### (a) Schedule II Prescriptions.

(1) Except as provided by subsection (e) of this section, a practitioner, as defined in, §481.002(39)(A) of the TCSA, must issue a written prescription for a Schedule II controlled substance only on an official Texas prescription form or through an electronic prescription that meets all requirements of the TCSA. This subsection also applies to a prescription issued in an emergency situation.

(2) A practitioner who issues a written prescription for any quantity of a Schedule II controlled substance must complete an official prescription form.

(3) Except as provided by subsection (f) of this section, a practitioner may issue multiple written prescriptions authorizing a patient to receive up to a 90-day supply of a Schedule II controlled substance provided:

(A) each prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice;

(B) the practitioner provides written instructions on each prescription, other than the first prescription if the practitioner intends for that prescription to be filled immediately, indicating the earliest date on which a pharmacy may dispense each prescription; and

(C) the practitioner concludes that providing the patient with multiple prescriptions in this manner does not create an undue risk of diversion or abuse.

(4) A schedule II prescription must be dispensed no later than 21 days after the date of issuance or, if the prescription is part of a multiple set of prescriptions, issued on the same day, no later than 21 days after the earliest date on which a pharmacy may dispense the prescription as indicated on each prescription.

(5) A person dispensing a Schedule II controlled substance prescription shall provide written notice on the safe disposal of controlled substance prescription drugs that includes information on locations at which Schedule II controlled substance prescription drugs are accepted for safe disposal. In lieu of listing those locations, the notice may alternatively provide the address of an Internet website specified by the board that provides a searchable database of locations at which Schedule II controlled substance prescription drugs are accepted for safe disposal. The written notice may be provided to the patient in an electronic format, such as by e-mail, if the patient or patient's agent requests the notice in an electronic format and the request is documented. Such written notice is not required if:

(A) the Schedule II controlled substance prescription drug is dispensed at a pharmacy or other location that:

(i) is authorized to take back those drugs for safe disposal; and

(ii) regularly accepts those drugs for safe disposal;

or

(B) the dispenser provides to the person to whom the Schedule II controlled substance prescription drug is dispensed, at the time of dispensation and at no cost to the person:

(i) a mail-in pouch for surrendering unused controlled substance prescription drugs; or

(ii) chemicals to render any unused drugs unusable or non-retrievable.

##### (b) Schedules III through V Prescriptions.

(1) A practitioner, as defined §§481.002(39)(A), (C), (D) of the TCSA, may use prescription forms and order forms through individual sources. A practitioner may issue, or allow to be issued by a person under the practitioner's direction or supervision, a Schedule III through V controlled substance on a prescription form for a valid medical purpose and in the course of medical practice.

(2) Except as provided in subsection (f) of this section, Schedule III through V prescriptions may be refilled up to five times within six months after date of issuance.

(c) Electronic prescription. A practitioner is permitted to issue and to dispense an electronic controlled substance prescription only in accordance with the requirements of the Code of Federal Regulations, Title 21, Part 1311.

(d) Controlled substance prescriptions may not be postdated.

(e) Advanced practice registered nurses or physician assistants may only use the official prescription forms issued with their name, address, phone number, and DEA numbers, and the delegating physician's name and DEA number.

(f) Opioids for the treatment of acute pain.

(1) For the treatment of acute pain, as defined in §481.07636 of the TCSA, a practitioner may not:



(A) issue a prescription for an opioid in an amount that exceeds a 10-day supply; or

(B) provide for a refill of the opioid prescription.

(2) Paragraph (1) of this subsection does not apply to a prescription for an opioid approved by the U.S. Food and Drug Administration for the treatment of substance addiction that is issued by a practitioner for the treatment of substance addiction.

(3) A dispenser is not subject to criminal, civil, or administrative penalties for dispensing or refusing to dispense a controlled substance under a prescription that exceed the limits provided by paragraph (1) of this subsection.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Allison Vordenbaumen Benz, R.Ph., M.S.

Executive Director

Texas State Board of Pharmacy

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For further information, please call: (512) 305-8010



## 22 TAC §315.16

The Texas State Board of Pharmacy proposes a new rule §315.16, concerning Patient Access to Prescription Monitoring Program Prescription Record. The new rule, if adopted, establishes the policy and procedures for a patient or the patient's legal guardian to obtain a copy of the patient's Prescription Monitoring Program prescription record, in accordance with House Bill 3284.

Allison Vordenbaumen Benz, R.Ph., M.S., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Ms. Benz has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the proposed rule will be to provide consistency between state law and Board rules and to provide procedures for a patient or the patient's legal guardian to obtain a copy of the patient's Prescription Monitoring Program prescription record. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed rule will be in effect, Ms. Benz has determined the following:

(1) The proposed rule does not create or eliminate a government program;

(2) Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions;

(3) Implementation of the proposed rule does not require an increase or decrease in the future legislative appropriations to the agency;

(4) The proposed rule does not require an increase or decrease in licensure fees paid to the agency, but does provide for a fee to obtain the records in accordance with state law;

(5) The proposed rule does create a new regulation in order to be consistent with state law;

(6) The proposed rule does not limit or expand an existing regulation;

(7) The proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed rule does not positively or adversely affect this state's economy.

Written comments on the proposed rule may be submitted to Megan G. Holloway, Assistant General Counsel, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-500, Austin, Texas 78701, FAX (512) 305-8061. Comments must be received by 5:00 p.m., February 3, 2020.

The new rule is proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the proposed rule: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

### §315.16. Patient Access to Prescription Monitoring Program Prescription Record.

(a) A patient, the patient's parent or legal guardian if the patient is a minor, or the patient's legal guardian if the patient is an incapacitated person as defined by §1002.017(2) of the Estates Code, may obtain a copy of the patient's prescription record, including a list of persons who have accessed that record, as authorized in §481.076(a)(9) of the Texas Controlled Substances Act, by submitting the following to the board:

(1) a completed, notarized patient data request form, including any information or supporting documentation requested on the form;

(2) a copy of the requestor's driver's license or other state photo identity card issued by the state's Department of Motor Vehicles;

(3) if requesting as a parent or legal guardian of the patient, a copy of the patient's birth certificate or the order of guardianship over the patient; and

(4) a \$50 fee.

(b) The board shall deliver the requested records to the requestor via certified mail to the address listed on the requestor's driver's license or other state photo identity card issued by the state's Department of Motor Vehicles.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-201904917



## TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

#### CHAPTER 3. TAX ADMINISTRATION

#### SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

##### 34 TAC §3.334

The Comptroller of Public Accounts proposes amendments to §3.334, concerning local sales and use taxes. In the wake of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (June 21, 2018), the amendments provide that remote sellers that are required to collect Texas use tax under §3.286 of this title (relating to Seller's and Purchaser's Responsibilities) should collect local use tax based on the destination location. The amendments also implement the requirement that a seller located in Texas collects local use tax when the seller ships or delivers a taxable item into a local jurisdiction where those use taxes exceed the local sales tax where the sale is consummated. The comptroller also implements House Bill 1525 and House Bill 2153, 86th Legislature, 2019. House Bill 1525 establishes local sales and use tax collection responsibilities on marketplace providers. House Bill 2153 establishes a single local use tax rate that remote sellers may elect to use. The amendments also clarify provisions concerning fulfillment, temporary places of business of the seller, places of business of the seller receiving more than three orders, traveling salespersons, orders over the Internet, and orders placed in person.

Throughout the section, the comptroller adds or amends rule titles. The comptroller also amends cross-references accordingly. The comptroller does not intend to make substantive changes through these additions of and amendments to rule titles and through the amendments to cross-references. The comptroller also reorganizes this section for clarity and readability.

The comptroller amends the definition of "Comptroller's website" in subsection (a)(4) to provide the correct website address.

The comptroller amends the definition of "engaged in business" in subsection (a)(7) to conform the reference to §3.286 of this title.

The comptroller amends subsection (a)(9) to identify activities that are not included in the definition of the term "fulfill".

The comptroller adds a definition for "Internet order" in new subsection (a)(10) to distinguish between an order placed through the Internet as opposed to an order placed in person at a seller's location as contemplated in Tax Code, §321.203(c) and §323.203(c). The comptroller has determined that orders placed on a website, through a software application, or other method using the Internet constitute orders over the Internet. Orders placed by phone call using Voice over Internet Protocol or a mobile device are not considered Internet orders. The

comptroller distinguishes orders through a computer or mobile device of the seller because the use of the Internet by sellers and purchasers to place orders has resulted in confusion as to whether an order is placed in person or over the Internet. For example, sellers use the Internet to place orders for items that are not in the store. However, mobile devices have made it possible for purchasers to place online orders at any location, including within a location of the seller. Subsequent paragraphs are renumbered.

The comptroller adds a definition for "marketplace provider" in new subsection (a)(15) as defined in §3.286 of this title.

The comptroller adds a definition for "order placed in person" in new subsection (a)(16). Orders placed in person are those orders placed with the seller while the purchaser is physically present at a seller's location and using a seller's system, computer, or other device. As a seller may use the Internet, a phone, or a catalog to make an order, the definition clarifies that an order is still placed in person regardless of whether the seller uses the Internet, a phone, or a catalog to make the order. Similarly, as a purchaser may use a personal mobile device to make an order while physically present at a seller's location, the definition excludes Internet orders, which as defined are placed from a purchaser's device. Subsequent paragraphs are renumbered.

The comptroller amends the definition of "place of business of the seller - general definition" in renumbered subsection (a)(17) to specify that a website, software application, or other method used to place an Internet order is not a place of business of the seller. Tax Code, §321.002(a)(3)(A) defines "place of business of the retailer" as "an established outlet, office, or location operated by the retailer or the retailer's agent or employee for the purpose of receiving orders for taxable items and includes any location at which three or more orders are received by the retailer during a calendar year." A website, software application, or other method used to place an Internet order is not an established outlet, office, or location operated by the seller and is therefore, excluded from the definition. The comptroller reflects these changes throughout the section.

The comptroller also amends the definition to delete repetitive language and an example that provides that a home office at which three or more items are sold through an online auction website is a place of business of the seller. The comptroller deletes a reference to "administrative offices" because the comptroller determines that an administrative office does not meet the definition of a place of business of the seller.

The comptroller also adds to the definition of "place of business of the seller - general definition" that an outlet, office, facility, or any similar location that contracts with a business to process certain orders or invoices is not a place of business of the seller if the comptroller determines that these certain locations are for the sole purpose to avoid tax due or to rebate tax to the contracting location. This change is made pursuant to the definition "place of business of the retailer" in Tax Code, §321.002(a)(3)(B).

The comptroller adds a definition for "remote seller" in new subsection (a)(19) as defined in §3.286 of this title. Subsequent paragraphs are renumbered.

The comptroller amends the definition of "temporary place of business of the seller" in renumbered subsection (a)(23) to clarify that a temporary place of business of the seller includes a sale outside the walls of a distribution center, manufacturing plant, storage yard, warehouse, or similar facility of the seller in a parking lot or similar space sharing the same physical address as the

facility. Sellers may hold sales to the public outside the walls of their facilities on a temporary basis. The comptroller clarifies that these sales constitute temporary places of business of the seller. The comptroller makes these changes throughout the section. Subsequent paragraphs are renumbered.

The comptroller adds new subsection (b), restating the provision of former subsection (e) concerning place of business - special definitions. The new subsection (b) is substantially the same as former subsection (e) but with changes to more closely reflect the definition of "place of business of the retailer" in Tax Code, §321.002(a)(3)(A). A seller does not receive orders at administrative offices that solely serve as the base of operations for a traveling salesperson or that provide administrative support to a traveling salesperson. Moreover, the mere fact that a salesperson is assigned to work from, or work at, a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller does not mean that a seller receives orders at these locations. Therefore, these locations by themselves do not meet the definition of a place of business of the retailer under Tax Code, §321.002(a)(3)(A). The comptroller amends the section to reflect these changes throughout. Therefore, the comptroller no longer includes administrative offices supporting traveling salespersons and distribution centers, manufacturing plants, storage yards, warehouses, or similar facilities operated by a seller at which salespersons are assigned to work in the definition of "place of business of the seller."

In new paragraph (1)(A), the comptroller clarifies that locations operated by a seller must receive three or more orders in a calendar year from persons other than employees, independent contractors and natural persons affiliated with the seller to be considered a place of business of the seller in Texas. In new paragraph (3) the comptroller restates the provisions from former subsection (e) relating to purchasing offices with minor changes for ease of readability.

The comptroller adds new subsection (c) to include the existing provisions of former subsection (h) concerning local sales tax. The new subsection (c) is similar to former subsection (h) but with some changes. New paragraph (1) provides the general sales tax rules as applied to specific situations and combines the provisions related to the consummation of sale rule, as that language appeared in former subsections (h)(1) and (h)(3).

New subparagraph (A) restates the deleted language in former subsection (h)(3)(A) relating to the consummation of sale rule for orders placed in person at a seller's place of business in Texas. The comptroller includes in subparagraph (A) orders placed at a temporary place of business of the seller. The comptroller does not add the provisions found in former subsection (h)(6)(C) because it repeats the general consummation of sale provisions applicable to temporary places of business.

Additionally, throughout new paragraph (1), the comptroller incorporates the language found in former subsection (h)(4) concerning traveling salespersons. Tax Code, §321.002(a)(3)(A) does not support treating administrative offices or other locations that are not places of business of the seller that merely serve as a location from which a traveling salesperson operates as a place of business of the seller. The comptroller makes this change to conform the consummation of sales made by traveling salespersons to Tax Code, §321.203 and §323.203. The comptroller does not incorporate the examples found in former subsection (h)(4) because the examples merely restate the consummation of sale rules.

The comptroller explicitly provides in new subparagraph (A) that orders taken by traveling salespersons are not placed in person at the seller's place of business in Texas. Traveling salespersons typically take orders at the customer's location and the customer's location is not a place of business "operated by the seller" as required by Tax Code, §321.002(a)(3)(A). See Comptroller's Decision No. 48,843 (2009) ("According to the plain meaning of the statutory definition, a site must be "operated by the retailer" before it can be considered the retailer's place of business.").

The comptroller adds new subparagraph (B) to include the provision in former subsection (h)(3)(B) concerning orders received at a place of business of the seller in Texas and fulfilled at a location that is not a place of business of the seller with changes.

In new clause (i), the comptroller does not incorporate the phrase "through the Internet" found in former subsection (h)(3)(B). Clause (i) does not apply to orders over the Internet because Internet orders are not received at a place of business of the seller in Texas. The comptroller also includes language concerning traveling salespersons in new clause (i).

In new clause (ii), the comptroller addresses where orders taken by traveling salesperson are considered received. The comptroller clarifies that orders taken by traveling salespersons are not received by the seller at the purchaser's location because the purchaser's location is not a place of business of the seller. See Comptroller's Decision No. 48,843 (2009).

The comptroller adds new subparagraph (C) to restate the provision in former subsection (h)(3)(C) concerning orders fulfilled at a place of business of the seller in Texas. The language is the same except for new language addressing traveling salespersons.

The comptroller adds new subparagraph (D) restating the provision in former subsection (h)(3)(D) concerning orders fulfilled within the state at a location that is not a place of business of the seller. The language is the same as it appeared in former subsection (h)(3)(D), except for new language addressing traveling salespersons.

The comptroller adds new subparagraph (E) and includes the provision in former subsection (h)(3)(E) concerning orders received outside of the state and fulfilled outside of the state with changes addressing traveling salespersons operating from a location outside of Texas and remote sellers.

In subparagraph (E) and throughout the section, the comptroller amends the language to implement the *Wayfair* decision. The *Wayfair* decision clarified the substantial nexus requirement established in the United States Supreme Court analysis of the Due Process and Commerce Clauses of the United States Constitution. The Court stated that "{substantial} nexus is established when a taxpayer {or collector} 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Wayfair*, 138 S. Ct. at 2099 (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)). The Court also reiterated that "States may not impose undue burdens on interstate commerce."

In light of the *Wayfair* decision, the comptroller provides in subparagraph (E) that a remote seller that is required to collect Texas use tax under §3.286(b)(2) must also collect local use tax based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession unless the remote seller elects to collect the single local use tax rate enacted in House Bill 2153. See Tax Code, §321.205(c) and §323.205(c).

The comptroller adds new subparagraph (F) restating the provision in former subsection (h)(3)(F) concerning an exception for qualifying economic development agreements entered into before January 1, 2009, pursuant to Tax Code, §321.203(c-4) - (c-5) or §323.203(c-4) - (c-5) .

The comptroller adds new paragraph (2) and includes the language in former subsection (h)(1) concerning local sales taxes due and local use taxes due without any changes. The comptroller restates the language in former subsection (h)(2) concerning multiple special purpose district taxes and multiple transit authority taxes in paragraph (3) without changes to the language.

The comptroller adds new paragraph (4) to include the language found in former subsection (h)(5) concerning drop shipments, but does not incorporate the examples found in former subsection (h)(5)(A). The comptroller adds new subparagraph (B) restating the language found in former subsection (h)(5)(B) without changes.

The comptroller adds new paragraph (5) to add the language found in former subsection (h)(6) concerning itinerant vendors and vending machines without changes to the language.

The comptroller adds new paragraph (6) to address the consummation of sale for Internet orders. This subsection becomes effective April 1, 2020.

In new subparagraph (A), the comptroller provides the general rule, with certain exceptions, that Internet orders are not received at a place business of the seller in Texas. A website, software application, or other method used to place an Internet order is excluded from the definition of place of business of the seller. Therefore, orders placed over the Internet are not received at a place of business of the seller in Texas.

In new subparagraph (B), the comptroller addresses orders placed using at the seller's device.

In new subparagraph (C), the comptroller addresses Internet orders fulfilled from a place of business of the seller in Texas.

In new subparagraph (D), the comptroller addresses Internet orders fulfilled from a location in Texas that is not a place of business of the seller in Texas.

In new subparagraph (E), the comptroller addresses Internet orders fulfilled from a location outside of the state.

In new subparagraph (F), the comptroller provides a temporary exception from the provisions regarding Internet orders for economic development agreements pursuant to Local Government Code, Chapters 380 and 381 and entered into before September 1, 2019.

The comptroller adds new subsection (d) to include the provisions in former subsection (i), relating to use tax. The comptroller adds new paragraph (1), which includes the language in former subsection (i)(1) concerning general local use tax rules with non-substantive changes for ease of readability.

The comptroller adds new paragraph (2) to include the provisions in former subsection (i)(2) concerning general use tax rules applied to specific situations with changes.

In light of the *Wayfair* decision, the comptroller gives effect to the Tax Code's requirement that sellers engaged in business in the state collect local use tax for sales consummated in Texas and for sales consummated outside Texas based on the local taxing jurisdictions in which a taxable item is first used, stored, or consumed, regardless of the specific local jurisdiction in which

a seller is engaged in business. See Tax Code, §§321.205, 322.105, and 323.205.

When a sale is consummated in Texas, a seller is engaged in business in this state through the presence of property or employees in the state. See Tax Code, §§151.107, 321.203, and 323.203. Therefore, the language that a seller be engaged in business in a local jurisdiction for sales consummated in Texas is superfluous. Moreover, an engaged in business standard for local use tax does not give effect to the Tax Code's requirement that a seller collect local use tax that is due and creates an opportunity for sellers to avoid collecting local use tax due. See Tax Code §§151.103, 321.003, 321.205, 322.108, 323.003, and 323.205. Therefore, the comptroller deletes the "engaged in business" requirement for local use tax throughout the section.

In new paragraph (2), the comptroller implements the *Wayfair* decision by clarifying that the seller is responsible for collecting the local use tax due on the sale based upon the location in this state to which the order is shipped or delivered or at which the purchaser of the item takes possession.

In new subparagraphs (B) and (C), the comptroller also explicitly states that the location of the seller in Texas does not affect the determination of whether the seller is required to collect additional local use tax due. In new clauses (i) and (ii), the comptroller provides two examples to illustrate when a seller is required to collect additional local use taxes.

The comptroller adds new subsection (e) to include the provisions in former subsection (b), relating to the effects of other law, with minor non-substantive changes to the provisions as they appeared in former subsection (b).

The comptroller adds new subsection (f), to include the provisions of former subsection (c), relating to tax rates without changing the provisions as they appeared in former subsection (c).

The comptroller adds new subsection (g) to include the provisions of former subsection (d), relating to jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements, with non-substantive changes made to the language on combined areas for ease of readability.

The comptroller adds new subsection (h) to include the provisions in former subsection (f) concerning places of business and job sites crossed by local taxing jurisdiction boundaries with a change to the title of the subsection to read places of business of the seller. No other changes were made to those provisions.

The comptroller adds new subsection (i). Throughout new subsection (i), the comptroller implements the *Wayfair* decision for local use tax to address sales consummated in Texas and sales consummated outside of Texas, including sales by remote sellers.

In new paragraph (1), the comptroller adds the language found in former subsection (g)(1) with changes. The comptroller explicitly states in paragraph (1) that the location of the seller in Texas does not affect the determination of whether the seller is required to collect additional local use tax due.

In new paragraph (2), the comptroller includes the language in former subsection (g)(2) with changes. The comptroller makes a cross-reference to new subsection (i)(3) of the amendment, which implements House Bill 2153. The comptroller also clarifies that new subsection (i)(2) applies to sales not consummated in Texas. The amendment provides that local use tax is based upon

the location in this state to which the item is shipped or delivered or at which the purchaser takes possession.

In new paragraph (3), the amendment addresses local use tax for remote sellers and implements the single local use tax rate for remote sellers enacted in House Bill 2153.

New subparagraph (A)(i) provides that a remote seller is required to collect and remit using the combined rate of all applicable local use taxes based on the location to which the item is shipped or delivered or at which the purchaser takes possession. New subparagraph (A)(ii) provides that at the remote seller's election, the remote seller may elect to use the single local use tax rate published in the *Texas Register*.

New subparagraph (B) addresses the single local use tax rate when a remote seller stores tangible personal property in Texas to be sold on a marketplace. The comptroller recognizes that a remote seller selling tangible personal property on a marketplace may not have control of where their tangible personal property is stored. Therefore, to ease the burden on a remote seller, this provision allows the remote seller to elect the single local use tax rate.

New subparagraph (C) addresses notice requirements a remote seller sends to the comptroller of its election and revocation of election to use the single local use tax rate. New clause (i) provides that a remote seller must notify the comptroller of its election to use the single local use tax rate on a form prescribed by the comptroller or may notify the comptroller of the election on its use tax permit application form before being able to use the single local use tax rate. New clause (i) also requires that a remote seller use the single local use tax rate for all its sales of taxable items until the remote seller revokes the election in writing to the comptroller. New clause (ii) addresses the requirements for a remote seller to revoke its election to collect the single local use tax rate by filing a form prescribed by the comptroller by October 1 of the calendar year.

New subparagraph (D)(i) provides the initial single local use tax rate of 1.75%, which is in effect for the period beginning October 1, 2019, and ending December 31, 2019. Subparagraph (D)(ii) provides the initial single local use tax rate of 1.75%, which is in effect for the period beginning January 1, 2020, and ending December 31, 2020.

New subparagraph (E) provides that before the beginning of a calendar year, the comptroller will publish notice of the single local use tax rate that will be in effect for that calendar year in the *Texas Register*.

New subparagraph (F) provides the calculation for the single local use tax rate.

New subparagraph (G) provides that a purchaser may request a refund based on local use taxes paid in a calendar year. The refund is for the difference between the single local use tax rate paid by the purchaser and the amount the purchaser would have paid based on the combined tax rate for all applicable local use taxes. Non-permitted purchasers may request a refund directly from the comptroller on an annual basis without having to meet the requirements in §3.325(a)(1) of this title (relating to Refunds and Payments Under Protest) and the statute of limitation under Tax Code, §111.104.

New subparagraph (H) addresses marketplace providers to provide that a marketplace provider may only use the combined tax rate of all applicable local use taxes when computing the amount of local use tax to collect and remit.

In new paragraph (4), the comptroller restates the language in deleted subsection (g)(4) concerning purchasers responsible for accruing and remitting local taxes if the seller fails to collect without any changes.

In new paragraph (5), the comptroller restates the language in deleted subsection (g)(5) concerning local tax due on the sales price of a taxable item without any changes.

The comptroller adds new paragraph (6) to relieve a purchaser of liability for additional use tax if the purchaser pays local use tax using the single local use tax rate to an eligible remote seller electing to use the single local use tax rate. Paragraph (6) also requires the purchaser to verify on the comptroller's website that a remote seller has elected to use the single local use tax rate. Moreover, paragraph (6) provides that if a remote seller is not listed on the comptroller's website, the purchaser will be liable for additional use tax due.

The comptroller deletes existing subsection (b), relating to the effect of other law, as this information is contained in new subsection (e) with minor, non-substantive changes.

The comptroller deletes existing subsection (c) relating to tax rates, as that information is contained in new subsection (f) without change.

The comptroller deletes existing subsection (d) relating to jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements, as this information is contained in new subsection (g) with non-substantive changes made to the provisions on combined areas for ease of readability.

The comptroller deletes existing subsection (e) relating to place of business - special definitions, as this information is contained in new subsection (b) with changes.

The comptroller deletes existing subsection (f) concerning places of business and job sites crossed by local taxing jurisdiction boundaries, as this information is contained in to new subsection (h) with a change only to the title of the subsection to read places of business of the seller.

The comptroller deletes subsection (g) concerning sellers' and purchasers' responsibilities for collecting or accruing local taxes, as those provisions, except for subsection (g)(3), which was deleted in its entirety, are contained in new subsection (i) with changes.

The comptroller deletes existing subsection (h) concerning local sales tax, as this information is contained in new subsection (c) with changes.

The comptroller deletes existing subsection (i) concerning use tax, as this information is contained in new subsection (d) with changes.

The comptroller adds new subsection (k)(5) to implement House Bill 1525, to address sales of taxable items through marketplace providers. Subsequent paragraphs are renumbered.

The provisions related to remote sellers, single local use tax rate, and marketplace providers take effect October 1, 2019.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase

or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the proposed amendments would benefit the public by conforming the rule to current statutes. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses or rural communities. The proposed amendments would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic cost to the public.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The comptroller proposes this amendment under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to amend rules to reflect changes in the constitution or laws of the United States and judicial interpretations thereof.

The amendments implement Tax Code, §§151.0595 (Single Local Tax Rate for Remote Sellers), 321.203 (Consummation of Sale), and 323.203 (Consummation of Sale), and *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (June 21, 2018).

#### §3.334. Local Sales and Use Taxes.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Cable system--The system through which a cable service provider delivers cable television or bundled cable service, as those terms are defined in §3.313 of this title (relating to Cable Television Service and Bundled Cable Service).

(2) City--An incorporated city, municipality, town, or village.

(3) City sales and use tax--The tax authorized under Tax Code, §321.101(a), including the additional municipal sales and use tax authorized under Tax Code, §321.101(b), the municipal sales and use tax for street maintenance authorized under Tax Code, §327.003, the Type A Development Corporation sales and use tax authorized under Local Government Code, §504.251, the Type B Development Corporation sales and use tax authorized under Local Government Code, §505.251, a sports and community venue project sales and use tax adopted by a city under Local Government Code, §334.081, and a municipal development corporation sales and use tax adopted by a city under Local Government Code, §379A.081. The term does not include the fire control, prevention, and emergency medical services district sales and use tax authorized under Tax Code, §321.106, or the municipal crime control and prevention district sales and use tax authorized under Tax Code, §321.108.

(4) Comptroller's website--The agency's website concerning local taxes located at: <https://comptroller.texas.gov/taxes/sales/> [<http://comptroller.texas.gov/taxinfo/local/>].

(5) County sales and use tax--The tax authorized under Tax Code, §323.101, including a sports and community venue project sales and use tax adopted by a county under Local Government Code, §334.081. The term does not include the county health services sales

and use tax authorized under Tax Code, §324.021, the county landfill and criminal detention center sales and use tax authorized under Tax Code, §325.021, or the crime control and prevention district sales and use tax authorized under Tax Code, §323.105.

(6) Drop shipment--A transaction in which an order is received by a seller at one location, but the item purchased is shipped by the seller from another location, or is shipped by the seller's third-party supplier, directly to a location designated by the purchaser.

(7) Engaged in business--This term has the meaning given in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities[; including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules]).

(8) Extraterritorial jurisdiction--An unincorporated area that is contiguous to the corporate boundaries of a city as defined in Local Government Code, §42.021

(9) Fulfill--To complete an order by transferring a taxable item directly to a purchaser at a Texas location, or to ship or deliver a taxable item to a location in Texas designated by the purchaser. The term does not include tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or a location designated by the purchaser.

(10) Internet order--An order placed on a website, software application, or other method using the Internet by a purchaser using a computer or mobile device that does not belong to the seller. Internet order does not include an order placed by phone call using Voice over Internet Protocol or a mobile device.

(11) [(40)] Itinerant vendor--A person who travels to various locations for the purpose of receiving orders and making sales of taxable items and who does not operate a place of business. For example, a person who sells rugs from the back of a truck that the person drives to a different location each day is an itinerant vendor. A person who sells items through vending machines is also an itinerant vendor. A salesperson that operates out of an office, place of business, or other location that provides administrative support to the salesperson is not an itinerant vendor.

(12) [(44)] Kiosk--A small stand-alone area or structure:

(A) that is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) that is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

(13) [(42)] Local taxes--Sales and use taxes imposed by any local taxing jurisdiction.

(14) [(43)] Local taxing jurisdiction--Any of the following:

(A) a city that imposes sales and use tax as provided under paragraph (3) of this subsection;

(B) a county that imposes sales and use tax as provided under paragraph (5) of this subsection;

(C) a special purpose district created under the Special District Local Laws Code or other provisions of Texas law that is authorized to impose sales and use tax by the Tax Code or other provisions of Texas law and as governed by the provisions of Tax Code, Chapters 321 or 323 and other provisions of Texas law; or

(D) a transit authority that imposes sales and use tax as authorized by Transportation Code, Chapters, 451, 452, 453, 457, or 460 and governed by the provisions of Tax Code, Chapter, 322.

(15) Marketplace provider--This term has the meaning given in §3.286 of this title.

(16) Order placed in person--An order placed by a purchaser with the seller while physically present at the seller's place of business on the system, computer, or other device of the seller, regardless of whether the seller uses the Internet, a phone, or a catalog to make the order. The term does not include Internet orders.

(17) [(14)] Place of business of the seller - general definition--An established outlet, office, or location operated by a seller for the purpose of selling taxable items to those other than employees, independent contractors, and natural persons affiliated with the seller and that receives three or more orders for taxable items during the calendar year. Places of business of the seller include, but are not limited to, call centers, showrooms, and clearance centers. [The term also includes any location operated by a seller at which the seller receives three or more orders for taxable items during a calendar year. For example, a home office at which three or more items are sold through an online auction website is a place of business.] A website, software application, or other method used to place an Internet order is not a place of business of the seller. Additional criteria for determining when a location is a place of business of the seller are provided in subsection (b)[(e)] of this section for [administrative offices;] distribution centers, manufacturing plants, storage yards, warehouses and similar facilities; kiosks; and purchasing offices. An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business, is not a "place of business of the retailer" if the comptroller determines that the outlet, office, facility, or location functions or exists to avoid the tax legally due under this chapter or exists solely to rebate a portion of the tax imposed by this chapter to the contracting business. An outlet, office, facility, or location does not exist to avoid the tax legally due under this chapter or solely to rebate a portion of the tax imposed by this chapter if the outlet, office, facility, or location provides significant business services, beyond processing invoices, to the contracting business, including logistics management, purchasing, inventory control, or other vital business services.

(18) [(15)] Purchasing office--An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business.

(19) Remote Seller--As defined in §3.286 of this title, remote seller is a seller engaged in business in this state whose only activity in the state is:

(A) engaging in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items; or

(B) soliciting orders for taxable items by mail or through other media including the Internet or other media that may be developed in the future.

(20) [(16)] Seller--This term has the meaning given in §3.286 of this title and also refers to any agent or employee of the seller.

(21) [(17)] Special purpose district--A local governmental entity authorized by the Texas legislature for a specific purpose, such as crime control, a local library, emergency services, county health services, or a county landfill and criminal detention center.

(22) [(18)] Storage--This term has the meaning given in §3.346 of this title (relating to Use Tax).

(23) [(19)] Temporary place of business of the seller--A location operated by a seller for a limited period of time for the purpose of selling and receiving orders for taxable items and where the seller has inventory available for immediate delivery to a purchaser. For example, a person who rents a booth at a weekend craft fair or art show to sell and take orders for jewelry, or a person who maintains a facility at a job site to rent tools and equipment to a contractor during the construction of real property, has established a temporary place of business. A temporary place of business of the seller includes a sale outside of a distribution center, manufacturing plant, storage yard, warehouse, or similar facility of the seller in a parking lot or similar space sharing the same physical address as the facility but not within the walls of the facility.

(24) [(20)] Transit authority--A metropolitan rapid transit authority (MTA), advanced transportation district (ATD), regional or subregional transportation authority (RTA), city transit department (CTD), county transit authority (CTA), regional mobility authority (RMA) or coordinated county transportation authority created under Transportation Code, Chapters 370, 451, 452, 453, 457, or 460.

(25) [(21)] Traveling salesperson--A seller, or an agent or employee of a seller, who visits potential purchasers in person to solicit sales, and who does not carry inventory ready for immediate sale, but who may carry samples or perform demonstrations of items for sale.

(26) [(22)] Two percent cap--A reference to the general rule that, except as otherwise provided by Texas law and as explained in this section, a seller cannot collect, and a purchaser is not obligated to pay, more than 2.0% of the sales price of a taxable item in total local sales and use taxes for all local taxing jurisdictions

(27) [(23)] Use--This term has the meaning given in §3.346 of this title.

(28) [(24)] Use tax--A tax imposed on the storage, use or other consumption of a taxable item in this state.

(b) Place of business of the seller - special definitions. In addition to the general definition of the term "place of business of the seller" in subsection (a)(17) of this section, the following rules apply.

(1) Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.

(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller at which the seller receives three or more orders of taxable items during a calendar year from persons other than employees, independent contractors, and natural persons affiliated with the seller.

(B) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller.

(2) Kiosks. A kiosk is not a place of business of the seller for the purpose of determining where a sale is consummated for local

tax purposes. A seller who owns or operates a kiosk in Texas is, however, engaged in business in this state as provided in §3.286 of this title.

(3) Purchasing offices.

(A) A purchasing office is not a place of business of the seller if the purchasing office exists solely to rebate a portion of the local sales and use tax imposed by Tax Code, Chapter 321 or 323 to a business with which it contracts; or if the purchasing office functions or exists to avoid the tax legally due under Tax Code, Chapter 321 or 323. A purchasing office does not exist solely to rebate a portion of the local sales and use tax or to avoid the tax legally due under Tax Code, Chapter 321 or 323 if the purchasing office provides significant business services to the contracting business beyond processing invoices, including logistics management, purchasing, inventory control, or other vital business services.

(B) In making a determination under subparagraph (A) of this paragraph, as to whether a purchasing office provides significant business services to the contracting business beyond processing invoices, the comptroller will compare the total value of the other business services to the value of processing invoices. If the total value of the other business services, including logistics management, purchasing, inventory control, or other vital business services, is less than the value of the service to process invoices, then the purchasing office will be presumed not to be a place of business of the seller.

(C) If the comptroller determines that a purchasing office is not a place of business of the seller, the sale of any taxable item is deemed to be consummated at the place of business of the seller from whom the purchasing office purchased the taxable item for resale and local sales and use taxes are due according to the following rules.

(i) When taxable items are purchased from a Texas seller, local sales taxes are due based on the location of the seller's place of business where the sale is deemed to be consummated, as determined in accordance with subsection (c) of this section.

(ii) When the sale of a taxable item is deemed to be consummated at a location outside of this state, local use tax is due based on the location where the items are first stored, used or consumed by the entity that contracted with the purchasing office in accordance with subsection (d) of this section.

(c) Local sales tax. Determining the local taxing jurisdictions to which sales tax is due; consummation of sale.

(1) General sales tax rules applied to specific situations. Except for the special rules applicable to remotes sellers in subsection (i)(3) of this section, direct payment permit purchases in subsection (j) of this section, and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in this state, regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in the state.

(A) Order placed in person at a seller's place of business in Texas. Except as described in subparagraph (F) of this paragraph and paragraph (6) of this subsection, for an order placed in person by a purchaser for a taxable item at a seller's place of business in Texas, including at a temporary place of business of the seller, the sale of that item is consummated at that place of business of the seller, regardless of the location where the order is fulfilled. Orders taken by traveling salespersons are not placed in person at the seller's place of business in Texas.

(B) Order received at a place of business of the seller in Texas, fulfilled at a location that is not a place of business of the seller.

(i) Except as provided in paragraph (6) of this subsection, when an order that is placed over the telephone, by any means other than in person, or through a traveling salesperson is received by the seller at a place of business of the seller in Texas, and the seller fulfills the order at a location that is not a place of business of the seller in Texas, such as a warehouse or distribution center, the sale is consummated at the place of business of the seller at which the order for the taxable item is received.

(ii) Orders taken by traveling salespersons operating out of a place of business of the seller in Texas are received by the seller at the place of business of the seller in Texas from which the traveling salesperson operates. Orders taken by traveling salespersons that are not operating out of a place of business of the seller in Texas are not received by the seller at a place of business of the seller in Texas. Orders taken by traveling salespersons are not received by the seller at the purchaser's location.

(C) Order fulfilled at a place of business of the seller in Texas. When an order is placed in person at a location that is not a place of business of the seller in this state, such as a kiosk, when an order is placed through a traveling salesperson, or when an order is placed over the telephone, through the Internet, or by any means other than in person, and the seller fulfills the order at a location that is a place of business of the seller in Texas, the sale is consummated at the place of business of the seller where the order is fulfilled.

(D) Order fulfilled within the state at a location that is not a place of business of the seller. When an order is received by a seller at any location other than a place of business of the seller in this state or by a traveling salesperson that does not operate out of a place of business of the seller in Texas, and the seller fulfills the order at a location in Texas that is not a place of business of the seller, then the sale is consummated at the location in Texas to which the order is shipped or delivered, or at which the purchaser of the item takes possession.

(E) Order received outside of the state, fulfilled outside of the state. When an order is received by a seller at a location outside of Texas, including orders received by a traveling salesperson operating from a location outside of Texas or by a remote seller, and the order is shipped or delivered into a local taxing jurisdiction from a location outside of the state, the sale is not consummated at a location in Texas. However, local use tax is due based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section. Except as provided in subsection (i)(3) of this section, a remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession.

(F) Exception for qualifying economic development agreements entered into before January 1, 2009, pursuant to Tax Code, §321.203(c-4) - (c-5) or §323.203(c-4) - (c-5). This subparagraph is effective until September 1, 2024. If applicable, the local sales tax due on the sale of a taxable item is based on the location of the qualifying warehouse, which is a place of business of the seller, from which the item is shipped or delivered or at which the purchaser of the item takes possession.

(2) Local sales taxes are due to each local taxing jurisdiction in effect at the location where the sale is consummated. Local use tax may also be due if the total amount of local sales taxes due does not reach the two percent cap, and the item purchased is shipped or delivered to a location in one or more different local taxing jurisdictions, as provided in subsection (d) of this section.



(3) Multiple special purpose district taxes, multiple transit authority sales taxes, or a combination of the two may apply to a single transaction. If the sale of a taxable item is consummated at a location within the boundaries of multiple special purpose districts or transit authorities, local sales tax is owed to each of the jurisdictions in effect at that location. For example, a place of business of the seller located in the city of San Antonio is within the boundaries of both the San Antonio Advanced Transportation District and the San Antonio Metropolitan Transit Authority, and the seller is required to collect sales tax for both transit authorities. Similarly, a place of business of the seller in Flower Mound is located within the boundaries of two special purpose districts, the Flower Mound Crime Control District and the Flower Mound Fire Control District, and the seller is responsible for collecting sales tax for both special purpose districts.

(4) Drop shipments.

(A) When an order for a taxable item is received at a seller's place of business in Texas, or by a traveling salesperson operating out of a place of business in this state, and the item is drop-shipped directly to the purchaser from a third-party supplier, the sale is consummated at, and local sales tax is due based upon, the location of the place of business of the seller where the order is received.

(B) When an order for a taxable item is received by the seller at a location outside of Texas, or by a traveling salesperson operating from a location outside of this state, and the item is drop-shipped directly to the purchaser from a third-party supplier, the item is subject to use tax. See subsection (d) of this section concerning use tax.

(5) Itinerant vendors; vending machines.

(A) Itinerant vendors. Sales made by itinerant vendors are consummated at, and itinerant vendors must collect sales tax based upon, the location where the item is delivered or at which the purchaser of the item takes possession. Itinerant vendors do not have any responsibility to collect use tax.

(B) Vending machines. Sales of taxable items made from a vending machine are consummated at the location of the vending machine. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service) for more information about vending machine sales.

(6) Internet orders. Subparagraphs (A) - (E) of this paragraph become effective April 1, 2020.

(A) General rule. Except as provided in this paragraph, Internet orders are not received at a place of business of the seller in Texas.

(B) Orders placed using the seller's device. When a purchaser places an order for a taxable item with a seller using the Internet on a computer or device of the seller at the seller's place of business in Texas, the sale is consummated at the place of business where the order is placed, regardless of where the order is fulfilled.

(C) Internet order fulfilled from a place of business of the seller in Texas. When a seller fulfills an Internet order at a location that is a place of business of the seller in Texas, the sale is consummated at the place of business of the seller where the order is fulfilled.

(D) Internet order fulfilled from a location in Texas that is not a place of business of the seller in Texas. When a seller fulfills an Internet order at a location in Texas that is not a place of business of the seller in Texas, the sale is consummated at the location in Texas to which the order is shipped or delivered, or at which the purchaser of the item takes possession.

(E) Internet order fulfilled from a location outside of the state. When an Internet order is shipped or delivered into a local taxing jurisdiction from a location outside of Texas, the sale is not consummated at a location in Texas. However, local use tax is due based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section.

(F) Exception for certain economic development agreements. Subparagraphs (A) - (E) of this paragraph do not apply to sales of taxable items for Internet orders made by a seller who has entered into an economic development agreement pursuant to Local Government Code, Chapters 380 and 381 with a local taxing jurisdiction before September 1, 2019. This subparagraph is effective until December 31, 2022.

(d) Local use tax. The provisions addressing the imposition of state use tax in §3.346 of this title also apply to the imposition of local use tax. For example, consistent with §3.346(e) of this title, all taxable items that are shipped or delivered to a location in this state that is within the boundaries of a local taxing jurisdiction are presumed to have been purchased for use in that local taxing jurisdiction as well as presumed to have been purchased for use in the state.

(1) General rules.

(A) When local use taxes are due in addition to local sales taxes as provided by subsection (c) of this section, all applicable use taxes must be collected or accrued in the following order until the two percent cap is reached: city, county, special purpose district, and transit authority. If more than one special purpose district use tax is due, all such taxes are to be collected or accrued before any transit authority use tax is collected or accrued. See subparagraphs (D) and (E) of this paragraph.

(B) If a local use tax cannot be collected or accrued at its full rate without exceeding the two percent cap, the seller cannot collect it, or any portion of it, and the purchaser is not responsible for accruing it.

(C) If a seller collects a local sales tax on an item, or a purchaser accrues a local sales tax on an item, a use tax for the same type of jurisdiction is not due on the same item. For example, after a city sales tax has been collected or accrued for an item, no use tax is due to that same or a different city on that item, but use tax may be due to a county, special purpose district, or transit authority. Similarly, if one or more special purpose district sales taxes have been collected or accrued for an item, no special purpose district use tax is due on that item, and if one or more transit authority sales taxes have been collected or accrued for an item, no transit authority use tax is due on that item.

(D) Collection or accrual of use tax for multiple special purpose districts. If more than one special purpose district use tax is in effect at the location where use of an item occurs, the special purpose district taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all special purpose district taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the district with the earliest effective date would exceed the two percent cap, the tax for that district is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (C) of this paragraph, whether use tax is due for the district that next became effective.

(i) If the competing special purpose district taxes became effective on the same date, the special purpose district taxes are due in the order of the earliest date for which the election in which the

district residents authorized the imposition of sales and use tax by the district was held.

(ii) If the elections to impose the local taxes were held on the same date, the special purpose district taxes are due in the order of the earliest date for which the enabling legislation under which each district was created became effective.

(E) Collection or accrual of use tax for multiple transit authorities. If more than one transit authority use tax is in effect at the location where use of an item occurs, and the two percent cap has not been met, the transit authority taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all transit authority taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the authority with the earliest effective date would exceed the two percent cap, the tax for that authority is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (D) of this paragraph, whether use tax is due for the authority that next became effective.

(i) If the competing transit authorities became effective on the same date, the transit authority taxes are due in the order of the earliest date for which the election in which the authority residents authorized the imposition of sales and use tax by the authority was held.

(ii) If the elections to impose local taxes were held on the same date, the transit authority use taxes are due in the order of the earliest date for which the enabling legislation under which each authority was created became effective.

(2) General use tax rules applied to specific situations. The following fact patterns explain how local use tax is to be collected or accrued and remitted to the comptroller based on, and subject to, the general rules in paragraph (1) of this subsection.

(A) Sale consummated outside the state, item delivered from outside the state or from a location in Texas that is not operated by the seller - local use tax due. Except as provided in subsection (i)(3) of this section, if a sale is consummated outside of this state according to the provisions of subsection (c) of this section, and the item purchased is either shipped or delivered to a location in this state as designated by the purchaser from a location outside of the state, or if the order is drop shipped directly to the purchaser from a third-party supplier, local use tax is owed based upon the location in this state to which the order is shipped or delivered or at which the purchaser of the item takes possession. The seller is responsible for collecting the local use tax due on the sale. If the seller does not collect the local use taxes due on the sale, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller according to the provisions in paragraph (1) of this subsection. For example, if an order for a taxable item is received by a seller at a location outside of Texas, and the order is shipped to the purchaser from a location outside of the state, local use tax is due based upon the location to which the order is shipped or delivered or at which the purchaser of the item takes possession.

(B) Sale consummated in Texas outside a local taxing jurisdiction, item delivered into one or more local taxing jurisdictions - local use tax due. If a sale is consummated at a location in Texas that is outside of the boundaries of any local taxing jurisdiction according to the provisions of subsection (c) of this section, and the order is shipped or delivered to the purchaser at a location in this state that is within the boundaries of one or more local taxing jurisdictions, local use tax is due based on the location to which the items are shipped or delivered or at which the purchaser of the item takes possession. The seller is responsible for collecting the local use taxes due on the sale, regardless of the location of the seller in Texas. If the seller fails to collect any

local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(C) Sale consummated in any local taxing jurisdictions imposing less than 2.0% in total local taxes - local sales taxes and use taxes due. If a sale is consummated at a location in Texas where the total local sales tax rate imposed by the taxing jurisdictions in effect at that location does not equal 2.0% according to the provisions of subsection (c) of this section, and the item is shipped or delivered to the purchaser at a location in this state that is inside the boundaries of a different local taxing jurisdiction, additional local use tax may be due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the two percent cap. The seller is responsible for collecting any additional local use taxes due on the sale, regardless of the location of the seller in Texas. See subsection (i) of this section. If the seller fails to collect the additional local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(i) Example one - if an order is received in person at a place of business of the seller, such that the sale is consummated at the location where the order is received as provided under subsection (c)(1)(A) of this section, and the local sales tax due on the sale does not meet the two percent cap, additional local use taxes are due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the provisions in paragraph (1) of this subsection.

(ii) Example two - if a seller receives an order for a taxable item at a seller's place of business in Texas, and the seller ships or delivers the item from an out-of-state location to a location in this state as designated by the purchaser, local sales tax is due based upon the location of the place of business of the seller where the order is received. If the local sales tax due on the item does not meet the two percent cap, use taxes, subject to the provisions in paragraph (1) of this subsection, are due based upon the location where the items are shipped or delivered or at which the purchaser of the item takes possession.

(e) Effect of other law.

(1) Tax Code, Title 2, Subtitles A (General Provisions) and B (Enforcement and Collection), Tax Code, Chapter 141 (Multistate Tax Compact) and Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) apply to transactions involving local taxes. Related sections of this title and comptroller rulings shall also apply with respect to local taxes. This includes authorities such as court cases and federal law that affect whether an item is taxable or is excluded or exempt from taxation.

(2) Permits, exemption certificates, and resale certificates required by Tax Code, Chapter 151, shall also satisfy the requirements for collecting and remitting local taxes, unless otherwise indicated by this section or other sections of this title. For example, see subsection (n) of this section concerning prior contract exemptions.

(3) Any provisions in this section or other sections of this title related to a seller's responsibilities for collecting and remitting local taxes to the comptroller shall also apply to a purchaser if the seller does not collect local taxes that are due. The comptroller may proceed against the seller or purchaser for the local tax owed by either.

(f) Tax rates. Except as otherwise provided by law, no local governmental entity may adopt or increase a sales and use tax if, as a result of the adoption or increase of the tax, the combined rate of all sales and use taxes imposed by local taxing jurisdictions having territory in the local governmental entity would exceed 2.0% at any location within the boundaries of the local governmental entity's jurisdiction. The following are the local tax rates that may be adopted.

(1) Cities. Cities may impose sales and use tax at a rate of up to 2.0%.

(2) Counties. Counties may impose sales and use tax at rates ranging from 0.5% to 1.5%.

(3) Special purpose districts. Special purpose districts may impose sales and use tax at rates ranging from 0.125% to 2.0%.

(4) Transit authorities. Transit authorities may impose sales and use tax at rates ranging from 0.25% to 1.0%.

(g) Jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements.

(1) Jurisdictional boundaries.

(A) City boundaries. City taxing jurisdictional boundaries cannot overlap one another and a city cannot impose a sales and use tax in an area that is already within the jurisdiction of another city.

(B) County boundaries. County tax applies to all locations within that county.

(C) Special purpose district and transit authority boundaries. Special purpose districts and transit authorities may cross or share boundaries with other local taxing jurisdictions and may encompass, in whole or in part, other local taxing jurisdictions, including cities and counties. A geographic location or address in this state may lie within the boundaries of more than one special purpose district or more than one transit authority.

(D) Extraterritorial jurisdictions. Except as otherwise provided by paragraph (3) of this subsection concerning strategic partnership agreements and subsection (1)(5) of this section concerning the City of El Paso and Fort Bliss, city sales and use tax does not apply to taxable sales that are consummated outside the boundaries of the city, including sales made in a city's extraterritorial jurisdiction. However, an extraterritorial jurisdiction may lie within the boundaries of a special purpose district, transit authority, county, or any combination of the three, and the sales and use taxes for those jurisdictions would apply to those sales.

(2) Combined areas. A combined area is an area where the boundaries of a city overlap the boundaries of one or more other local taxing jurisdictions as a result of an annexation of additional territory by the city, and where, as the result of the imposition of the city tax in the area in addition to the local taxes imposed by the existing taxing jurisdictions, the combined local tax rate would exceed 2.0%. The comptroller shall make accommodations to maintain a 2.0% rate in any combined area by distributing the 2.0% tax revenue generated in these combined areas to the local taxing jurisdictions located in the combined areas as provided in Tax Code, §321.102 or Health and Safety Code, §775.0754. Combined areas are identified on the comptroller's website. Sellers engaged in transactions on which local sales or use taxes are due in a combined area, or persons who must self-accrue and remit tax directly to the comptroller, must use the combined area local code when reporting the tax rather than the codes for the individual city, county, special purpose districts, or transit authorities that make up the combined area.

(3) City tax imposed through strategic partnership agreements.

(A) The governing bodies of a district, as defined in Local Government Code, §43.0751, and a city may enter into a limited-purpose annexation agreement known as a strategic partnership agreement. Under this agreement, the city may impose sales and use tax within all or part of the boundaries of a district. Areas within a district that are annexed for this limited purpose are treated as though they

are within the boundaries of the city for purposes of city sales and use tax.

(B) Counties, transit authorities, and special purpose districts may not enter into strategic partnership agreements. Sales and use taxes imposed by those taxing jurisdictions do not apply in the limited-purpose annexed area as part of a strategic partnership agreement between a city and an authorized district. However, a county, special purpose district, or transit authority sales and use tax, or any combination of these three types of taxes, may apply at locations included in a strategic partnership agreement between a city and an authorized district if the tax is imposed in that area by the applicable jurisdiction as allowed under its own controlling authorities.

(C) Prior to September 1, 2011, the term "district" was defined in Local Government Code, §43.0751 as a municipal utility district or a water control and improvement district. The definition was amended effective September 1, 2011, to mean a conservation and reclamation district operating under Water Code, Chapter 49.

(h) Places of business of the seller and job sites crossed by local taxing jurisdiction boundaries.

(1) Places of business of the seller crossed by local taxing jurisdiction boundaries. If a place of business of the seller is crossed by one or more local taxing jurisdiction boundaries so that a portion of the place of business of the seller is located within a taxing jurisdiction and the remainder of the place of business of the seller lies outside of the taxing jurisdiction, tax is due to the local taxing jurisdictions in which the sales office is located. If there is no sales office, sales tax is due to the local taxing jurisdictions in which any cash registers are located.

(2) Job sites.

(A) Residential repair and remodeling; new construction of an improvement to realty. When a contractor is improving real property under a separated contract, and the job site is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on any separately stated charges for taxable items incorporated into the real property must be allocated to the local taxing jurisdictions based on the total square footage of the real property improvement located within each jurisdiction, including the square footage of any standalone structures that are part of the construction, repair, or remodeling project. For more information about tax due on materials used at residential and new construction job sites, refer to §3.291 of this title (relating to Contractors).

(B) Nonresidential real property repair and improvement. When taxable services are performed to repair, remodel, or restore nonresidential real property, including a pipeline, transmission line, or parking lot, that is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on the taxable services, including materials and any other charges connected to the services performed, must be allocated among the local taxing jurisdictions based upon the total mileage or square footage, as appropriate, of the repair, remodeling, or restoration project located in each jurisdiction. For more information about tax due on materials used at nonresidential real property repair and remodeling job sites, refer to §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(i) Sellers' and purchasers' responsibilities for collecting or accruing local taxes.

(1) Sale consummated in Texas; seller responsible for collecting local sales taxes and applicable local use taxes. When a sale of a taxable item is consummated at a location in Texas as provided by subsection (c) of this section, the seller must collect each local sales tax in effect at the location. If the total rate of local sales tax due on the sale

does not reach the two percent cap, and the seller ships or delivers the item into another local taxing jurisdiction, then the seller is required to collect additional local use taxes due, if any, based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession, regardless of the location of the seller in Texas. For more information regarding local use taxes, refer to subsection (d) of this section.

(2) Out-of-state sale; seller engaged in business in Texas. Except as provided in paragraph (3) of this subsection, when a sale is not consummated in Texas, a seller who is engaged in business in this state is required to collect and remit local use taxes due, if any, on orders of taxable items shipped or delivered at the direction of the purchaser into a local taxing jurisdiction in this state based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section.

(3) Local use tax rate for remote sellers.

(A) A remote seller required to collect and remit one or more local use taxes in connection with a sale of a taxable item must compute the amount using:

(i) the combined tax rate of all applicable local use taxes based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession; or

(ii) at the remote seller's election, the single local use tax rate published in the *Texas Register*.

(B) A remote seller that is storing tangible personal property in Texas to be used for fulfillment at a facility of a marketplace provider that has certified that it will assume the rights and duties of a seller with respect to the tangible personal property, as provided for in §3.286 of this title, may elect the single local use tax rate under subparagraph (A)(ii) of this paragraph.

(C) Notice to the comptroller of election and revocation of election.

(i) Before using the single local use tax rate, a remote seller must notify the comptroller of its election using a form prescribed by the comptroller. A remote seller may also notify the comptroller of the election on its use tax permit application form. The remote seller must use the single local use tax rate for all of its sales of taxable items until the election is revoked as provided in clause (ii) of this subparagraph.

(ii) A remote seller may revoke its election by filing a form prescribed by the comptroller. If the comptroller receives the notice by October 1, the revocation will be effective January 1 of the following year. If the comptroller receives the notice after October 1, the revocation will be effective January 1 of the year after the following year. For example, a remote seller must notify the comptroller by October 1, 2020, for the revocation to be effective January 1, 2021. If the comptroller receives the revocation on November 1, 2020, the revocation will be effective January 1, 2022.

(D) Single local use tax rate.

(i) The single local use tax rate in effect for the period beginning October 1, 2019, and ending December 31, 2019, is 1.75%.

(ii) The single local use tax rate in effect for the period beginning January 1, 2020, and ending December 31, 2020, is 1.75%.

(E) Annual publication of single local use tax rate. Before the beginning of a calendar year, the comptroller will publish no-

tice of the single local use tax rate in the *Texas Register* that will be in effect for that calendar year.

(F) Calculating the single local use tax rate. The single local use tax rate effective in a calendar year is equal to the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year. As soon as practicable after the end of a state fiscal year, the comptroller must determine the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year by:

(i) dividing the total amount of net local sales and use taxes remitted to the comptroller during the state fiscal year by the total amount of net state sales and use tax remitted to the comptroller during the state fiscal year;

(ii) multiplying the amount computed under clause (i) of this subparagraph by the rate provided in Tax Code, §151.051; and

(iii) rounding the amount computed under clause (ii) of this subparagraph to the nearest .0025.

(G) Direct refund. A purchaser may request a refund based on local use taxes paid in a calendar year for the difference between the single local use tax rate paid by the purchaser and the amount the purchaser would have paid based on the combined tax rate for all applicable local use taxes. Notwithstanding the refund requirements under §3.325(a)(1) of this title (relating to Refunds and Payments Under Protest), a non-permitted purchaser may request a refund directly from the comptroller for the tax paid in the previous calendar year, no earlier than January 1 of the following calendar year within the statute of limitation under Tax Code, 111.104 (Refunds).

(H) Marketplace providers. Notwithstanding subparagraph (A) of this paragraph, marketplace providers may not use the single local use tax rate and must compute the amount of local use tax to collect and remit using the combined tax rate of all applicable local use taxes.

(4) Purchaser responsible for accruing and remitting local taxes if seller fails to collect.

(A) If a seller does not collect the state sales tax, any applicable local sales taxes, or both, on a sale of a taxable item that is consummated in Texas, then the purchaser is responsible for filing a return and paying the tax. The local sales taxes due are based on the location in this state where the sale is consummated as provided in subsection (c) of this section.

(B) A purchaser who buys an item for use in Texas from a seller who does not collect the state use tax, any applicable local use taxes, or both, is responsible for filing a return and paying the tax. The local use taxes due are based on the location where the item is first stored, used, or consumed by the purchaser.

(C) For more information about how to report and pay use tax directly to the comptroller, see §3.286 of this title.

(5) Local tax is due on the sales price of a taxable item, as defined in Tax Code, §151.007, in the report period in which the taxable item is purchased or the period in which the taxable item is first stored, used, or otherwise consumed in a local taxing jurisdiction.

(6) A purchaser is not liable for additional local use tax if the purchaser pays local use tax using the rate elected by an eligible remote seller according to paragraph (3) of this subsection. The remote seller must be identified on the comptroller's website as electing to use the single local use tax rate. A purchaser must verify that the remote seller is listed on the comptroller's website. If the remote seller is not

listed on the comptroller's website, the purchaser will be liable for additional use tax due in accordance to paragraph (4) of this subsection.

[(b) Effect of other law.]

[(1) Tax Code, Title 2, Subtitles A (General Provisions) and B (Enforcement and Collection); Tax Code, Chapter 141 (Multi-state Tax Compact) and Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) apply to transactions involving local taxes. Related sections of this title and comptroller rulings shall also apply with respect to local taxes. This includes authorities such as court cases and federal law that affect whether an item is taxable or is excluded or exempt from taxation.]

[(2) Permits, exemption certificates, and resale certificates required by Tax Code, Chapter 151, shall also satisfy the requirements for collecting and remitting local taxes, unless otherwise indicated by this section or other sections of this title. For example, see subsection (n) of this section concerning prior contract exemptions.]

[(3) Any provisions in this section or other sections of this title related to a seller's responsibilities for collecting and remitting local taxes to the comptroller shall also apply to a purchaser if the seller does not collect local taxes that are due. The comptroller may proceed against the seller or purchaser for the local tax owed by either.]

[(c) Tax rates. Except as otherwise provided by law, no local governmental entity may adopt or increase a sales and use tax if, as a result of the adoption or increase of the tax, the combined rate of all sales and use taxes imposed by local taxing jurisdictions having territory in the local governmental entity would exceed 2.0% at any location within the boundaries of the local governmental entity's jurisdiction. The following are the local tax rates that may be adopted:]

[(1) Cities. Cities may impose sales and use tax at a rate of up to 2.0%.]

[(2) Counties. Counties may impose sales and use tax at rates ranging from 0.5% to 1.5%.]

[(3) Special purpose districts. Special purpose districts may impose sales and use tax at rates ranging from 0.125% to 2.0%.]

[(4) Transit authorities. Transit authorities may impose sales and use tax at rates ranging from 0.25% to 1.0%.]

[(d) Jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements.]

[(1) Jurisdictional boundaries.]

[(A) City boundaries. City taxing jurisdictional boundaries cannot overlap one another and a city cannot impose a sales and use tax in an area that is already within the jurisdiction of another city.]

[(B) County boundaries. County tax applies to all locations within that county.]

[(C) Special purpose district and transit authority boundaries. Special purpose districts and transit authorities may cross or share boundaries with other local taxing jurisdictions and may encompass, in whole or in part, other local taxing jurisdictions, including cities and counties. A geographic location or address in this state may lie within the boundaries of more than one special purpose district or more than one transit authority.]

[(D) Extraterritorial jurisdictions. Except as otherwise provided by paragraph (3) of this subsection concerning strategic partnership agreements and subsection (1)(5) of this section concerning the City of El Paso and Fort Bliss, city sales and use tax does not apply to taxable sales that are consummated outside the boundaries of the city, including sales made in a city's extraterritorial jurisdiction. However,

an extraterritorial jurisdiction may lie within the boundaries of a special purpose district, transit authority, county, or any combination of the three, and the sales and use taxes for those jurisdictions would apply to those sales.]

[(2) Combined areas. A combined area is an area where the boundaries of a city overlap the boundaries of one or more other local taxing jurisdictions as a result of an annexation of additional territory by the city, and where, as the result of the imposition of the city tax in the area in addition to the local taxes imposed by the existing taxing jurisdictions, the combined local tax rate would exceed 2.0%. The comptroller shall make accommodations to maintain a 2.0% rate in any combined area. Sellers engaged in transactions on which local sales or use taxes are due in a combined area, or persons who must self-accrete and remit tax directly to the comptroller, must use the combined area local code when reporting the tax rather than the codes for the individual city, county, special purpose districts, or transit authorities that make up the combined area. The comptroller shall distribute the tax revenue generated in these combined areas to the local taxing jurisdictions located in the combined areas as provided in Tax Code, §321.102 or Health and Safety Code, §775.0754. Combined areas are identified on the comptroller's website.]

[(3) City tax imposed through strategic partnership agreements.]

[(A) The governing bodies of a district, as defined in Local Government Code, §43.0751, and a city may enter into a limited-purpose annexation agreement known as a strategic partnership agreement. Under this agreement, the city may impose sales and use tax within all or part of the boundaries of a district. Areas within a district that are annexed for this limited purpose are treated as though they are within the boundaries of the city for purposes of city sales and use tax.]

[(B) Counties, transit authorities, and special purpose districts may not enter into strategic partnership agreements. Sales and use taxes imposed by those taxing jurisdictions do not apply in the limited-purpose annexed area as part of a strategic partnership agreement between a city and an authorized district. However, a county, special purpose district, or transit authority sales and use tax, or any combination of these three types of taxes, may apply at locations included in a strategic partnership agreement between a city and an authorized district if the tax is imposed in that area by the applicable jurisdiction as allowed under its own controlling authorities.]

[(C) Prior to September 1, 2011, the term "district" was defined in Local Government Code, §43.0751 as a municipal utility district or a water control and improvement district. The definition was amended effective September 1, 2011, to mean a conservation and reclamation district operating under Water Code, Chapter 49.]

[(e) Place of business - special definitions. In addition to the general definition of the term "place of business" in subsection (a)(14) of this section, the following rules apply.]

[(1) Administrative offices supporting traveling salespersons. Any outlet, office, or location operated by a seller that serves as a base of operations for a traveling salesperson or that provides administrative support to a traveling salesperson is a place of business.]

[(2) Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.]

[(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller at which the seller receives three or more orders for taxable items during the calendar year is a place of business.]

[(B) If a salesperson who receives three or more orders for taxable items within a calendar year is assigned to work from, or to work at, a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the facility is a place of business.]

[(C) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller.]

[(3) Kiosks. A kiosk is not a place of business for the purpose of determining where a sale is consummated for local tax purposes. A seller who owns or operates a kiosk in Texas is, however, engaged in business in this state as provided in §3.286 of this title.]

[(4) Purchasing offices.]

[(A) A purchasing office is not a place of business if the purchasing office exists solely to rebate a portion of the local sales and use tax imposed by Tax Code, Chapter 321 or 323 to a business with which it contracts; or if the purchasing office functions or exists to avoid the tax legally due under Tax Code, Chapter 321 or 323. A purchasing office does not exist solely to rebate a portion of the local sales and use tax or to avoid the tax legally due under Tax Code, Chapter 321 or 323 if the purchasing office provides significant business services; beyond processing invoices; to the contracting business; including logistics management, purchasing, inventory control, or other vital business services.]

[(B) When the comptroller determines that a purchasing office is not a place of business, the sale of any taxable item is deemed to be consummated at the place of business of the seller from whom the purchasing office purchased the taxable item for resale and local sales and use taxes are due according to the following rules:]

[(i) When taxable items are purchased from a Texas seller, local sales taxes are due based on the location of the seller's place of business where the sale is deemed to be consummated; as determined in accordance with subsection (h) of this section.]

[(ii) When the sale of a taxable item is deemed to be consummated at a location outside of this state, local use tax is due based on the location where the items are first stored, used or consumed by the entity that contracted with the purchasing office in accordance with subsection (i) of this section.]

[(C) In making a determination under subparagraph (A) of this paragraph, as to whether a purchasing office provides significant business services to the contracting business, the comptroller will look to the books and records of the purchasing office to determine whether the total value of the business services provided to the contracting business equals or exceeds the total value of processing invoices. If the total value of the business services provided, including logistics management, purchasing, inventory control, or other vital business services, is less than the total value of the service to process invoices, then the purchasing office will be presumed not to be a place of business of the seller.]

[(f) Places of business and job sites crossed by local taxing jurisdiction boundaries.]

[(1) Places of business crossed by local taxing jurisdiction boundaries. If a place of business is crossed by one or more local taxing jurisdiction boundaries so that a portion of the place of business is located within a taxing jurisdiction and the remainder of the place of business lies outside of the taxing jurisdiction, tax is due to the local taxing jurisdictions in which the sales office is located. If there is no

sales office, sales tax is due to the local taxing jurisdictions in which any cash registers are located.]

[(2) Job sites.]

[(A) Residential repair and remodeling; new construction of an improvement to realty. When a contractor is improving real property under a separated contract, and the job site is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on any separately stated charges for taxable items incorporated into the real property must be allocated to the local taxing jurisdictions based on the total square footage of the real property improvement located within each jurisdiction, including the square footage of any standalone structures that are part of the construction, repair, or remodeling project. For more information about tax due on materials used at residential and new construction job sites, refer to §3.291 of this title (relating to Contractors).]

[(B) Nonresidential real property repair and improvement. When taxable services are performed to repair, remodel, or restore nonresidential real property, including a pipeline, transmission line, or parking lot, that is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on the taxable services, including materials and any other charges connected to the services performed, must be allocated among the local taxing jurisdictions based upon the total mileage or square footage, as appropriate, of the repair, remodeling, or restoration project located in each jurisdiction. For more information about tax due on materials used at nonresidential real property repair and remodeling job sites, refer to §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).]

[(g) Sellers' and purchasers' responsibilities for collecting or accruing local taxes.]

[(1) Sale consummated in Texas; seller responsible for collecting local sales taxes and applicable local use taxes. When a sale of a taxable item is consummated at a location in Texas as provided by subsection (h) of this section, the seller must collect each local sales tax in effect at the location except as provided in paragraph (3) of this subsection. If the total rate of local sales tax due on the sale does not reach the two percent cap, and the seller ships or delivers the item into another local taxing jurisdiction in which the seller is engaged in business, then the seller is required to collect additional local use taxes due, if any, based on the location to which the item is shipped or delivered. For more information regarding local use taxes, refer to subsection (i) of this section.]

[(2) Out-of-state sale; seller engaged in business in Texas. A seller who is engaged in business in this state is required to collect and remit local use taxes due, if any, on orders of taxable items shipped or delivered at the direction of the purchaser into a local taxing jurisdiction in this state in which the seller is engaged in business.]

[(3) A seller is only required to collect local sales or use taxes for a local taxing jurisdiction in which the seller is engaged in business.]

[(4) Purchaser responsible for accruing and remitting local taxes if seller fails to collect.]

[(A) If a seller does not collect the state sales tax, any applicable local sales taxes, or both on a sale of a taxable item that is consummated in Texas, then the purchaser is responsible for filing a return and paying the tax. The local sales taxes due are based on the location in this state where the sale is consummated as provided in subsection (h) of this section.]

[(B) A purchaser who buys an item for use in Texas from a seller who does not collect the state use tax, any applicable local use taxes, or both, is responsible for filing a return and paying the tax. The local use taxes due are based on the location where the item is first stored, used, or consumed by the purchaser.]

[(C) For more information about how to report and pay use tax directly to the comptroller, see §3.286 of this title.]

[(5) Local tax is due on the sales price of a taxable item, as defined in Tax Code, §151.007, in the report period in which the taxable item is purchased or the period in which the taxable item is first stored, used, or otherwise consumed in a local taxing jurisdiction.]

[(h) Local sales tax. Determining the local taxing jurisdictions to which sales tax is due; consummation of sale.]

[(1) General rule. Except for the special rules applicable to direct payment permit purchases and certain taxable items as provided in subsections (j) and (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. Local sales taxes are due to each local taxing jurisdiction in effect at the location where the sale is consummated. Local use tax may also be due if the total amount of local sales taxes due does not reach the two percent cap, and the item purchased is shipped or delivered to a location in one or more different local taxing jurisdictions, as provided in subsection (i) of this section.]

[(2) Multiple special purpose district taxes, multiple transit authority sales taxes, or a combination of the two may apply to a single transaction. If the sale of a taxable item is consummated at a location within the boundaries of multiple special purpose districts or transit authorities, local sales tax is owed to each of the jurisdictions in effect at that location. For example, a place of business located in the city of San Antonio is within the boundaries of both the San Antonio Advanced Transportation District and the San Antonio Metropolitan Transit Authority, and the seller is required to collect sales tax for both transit authorities. Similarly, a place of business in Flower Mound is located within the boundaries of two special purpose districts, the Flower Mound Crime Control District and the Flower Mound Fire Control District, and the seller is responsible for collecting sales tax for both special purpose districts.]

[(3) Consummation of sale. The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in this state, regardless of whether they have a place of business in Texas or multiple places of business in the state.]

[(A) Order placed in person at a seller's place of business in Texas. When a purchaser places an order for a taxable item in person at a seller's place of business in Texas, the sale of that item is consummated at that place of business, regardless of the location where the order is fulfilled, except in the limited circumstances described in subparagraph (F) of this paragraph, concerning qualifying economic development agreements.]

[(B) Order received at a place of business in Texas, fulfilled at a location that is not a place of business. When an order that is placed over the telephone, through the Internet, or by any means other than in person is received by the seller at a place of business in Texas, and the seller fulfills the order at a location that is not a place of business of the seller in Texas, such as a warehouse or distribution center, the sale is consummated at the place of business at which the order for the taxable item is received.]

[(C) Order fulfilled at a place of business in Texas. When an order is placed in person at a location that is not a place of business of the seller in this state, such as a kiosk, or when an order is placed over the telephone, through the Internet, or by any means

other than in person, and the seller fulfills the order at a location that is a place of business in Texas, the sale is consummated at the place of business where the order is fulfilled.]

[(D) Order fulfilled within the state at a location that is not a place of business. When an order is received by a seller at any location other than a place of business of the seller in this state, and the seller fulfills the order at a location in Texas that is not a place of business of the seller, then the sale is consummated at the location in Texas to which the order is shipped or delivered, or the location where it is transferred to the purchaser.]

[(E) Order received outside of the state, fulfilled outside of the state. When an order is received by a seller at a location outside of Texas, and the order is shipped or delivered into a local taxing jurisdiction from a location outside of the state, the sale is not consummated at a location in Texas. However, local use tax is due based upon the location in this state to which the item is shipped or delivered or at which possession of the item is taken by the purchaser as provided in subsection (i) of this section.]

[(F) Exception for qualifying economic development agreements entered into before January 1, 2009, pursuant to Tax Code, §321.203(e-4) - (e-5) or §323.203(e-4) - (e-5). This subparagraph is effective until September 1, 2024. If applicable, the local sales tax due on the sale of a taxable item is based on the location of the qualifying warehouse, which is a place of business of the seller, from which the item is shipped or delivered or at which the purchaser takes possession of the item.]

[(4) Orders received by traveling salespersons. Orders taken by traveling salespersons are received by the seller at the administrative office or other place of business from which the traveling salesperson operates, and such sales are consummated at the location indicated in paragraph (3) of this subsection. For example, if a traveling salesperson who operates out of a place of business of a seller in Texas takes an order for a taxable item, and the order is fulfilled at a location that is not a place of business of the seller in this state, the sale is consummated at the place of business from which the salesperson operates, in accordance with paragraph (3)(B) of this subsection. Similarly, if a traveling salesperson takes an order for a taxable item, and the order is fulfilled at a place of business of the seller in this state, the sale is consummated at the location of the place of business where the order is fulfilled, in accordance with paragraph (3)(C) of this subsection.]

[(5) Drop shipments.]

[(A) When an order for a taxable item is received at a seller's place of business in Texas, or by a traveling salesperson operating out of a place of business in this state, and the item is drop-shipped directly to the purchaser from a third-party supplier, the sale is consummated at, and local sales tax is due based upon, the location of the place of business where the order is received. When an order for a taxable item is received by a seller at one location, but shipped by the seller to the purchaser from a different location, the sale is consummated at, and local sales tax is due based upon, the location designated in paragraph (3) of this subsection. If the local sales taxes due based on the location of the seller's place of business at which the sale is consummated equal less than 2.0%, additional local use tax may be due based upon the location in this state to which the purchased item is shipped or delivered or at which possession of the item is taken by the purchaser as provided in subsection (i) of this section.]

[(B) When an order for a taxable item is received by the seller at a location outside of Texas, or by a traveling salesperson operating from a location outside of this state, and the item is drop-shipped directly to the purchaser from a third-party supplier, the item

is subject to use tax. See subsection (i) of this section concerning use tax.]

[(6) Itinerant vendors; vending machines; temporary places of business.]

[(A) Itinerant vendors. Sales made by itinerant vendors are consummated at, and itinerant vendors must collect sales tax based upon, the location where the item is delivered or where the purchaser takes possession of the item. Itinerant vendors do not have any responsibility to collect use tax.]

[(B) Vending machines. Sales of taxable items made from a vending machine are consummated at the location of the vending machine. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service) for more information about vending machine sales.]

[(C) Temporary places of business.]

[(i) Item transferred to purchaser at time of sale. When a seller operates a temporary place of business, and items purchased are transferred to the purchasers at the time of sale, the sales are consummated at, and local sales tax is due based upon, the location of the temporary place of business.]

[(ii) Order accepted at temporary place of business prior to June 19, 2009. If a seller received an order at a temporary place of business prior to June 19, 2009, and the order was fulfilled at another place of business of the seller in this state, the sale was consummated at, and local sales taxes are due based upon, the location of the place of business where the order was fulfilled and not the temporary location where the order was received.]

[(iii) Order accepted at temporary place of business on or after June 19, 2009. When a seller receives an order in person at a temporary place of business and the order is fulfilled at another location, the sale is consummated at, and local sales taxes are due based upon, the location of the temporary place of business where the order was received.]

[(i) Use tax. The provisions addressing the imposition of state use tax in §3.346 of this title also apply to the imposition of local use tax. For example, consistent with §3.346(e) of this title, all taxable items that are shipped or delivered to a location in this state that is within the boundaries of a local taxing jurisdiction are presumed to have been purchased for use in that local taxing jurisdiction as well as presumed to have been purchased for use in the state.]

[(1) General rules.]

[(A) When local use taxes are due in addition to local sales taxes as provided by subsection (h) of this section, all applicable use taxes must be collected or accrued in the following order until the two percent cap is reached: city, county, special purpose district, and transit authority. If more than one special purpose district use tax is due, all such taxes are to be collected or accrued before any transit authority use tax is collected or accrued. See subparagraphs (D) and (E) of this paragraph.]

[(B) If a local use tax cannot be collected or accrued at its full rate without exceeding the two percent cap, the seller cannot collect it, or any portion of it, and the purchaser is not responsible for accruing it.]

[(C) If a seller collects a local sales tax on an item, or a purchaser accrues a local sales tax on an item, a use tax for the same type of jurisdiction is not due on the same item. For example, once a city sales tax has been collected or accrued for an item, no use tax is due to that same or a different city on that item, but use tax may be due

to a county, special purpose district, or transit authority. Similarly, if one or more special purpose district sales taxes have been collected or accrued for an item, no special purpose district use tax is due on that item, and if one or more transit authority sales taxes have been collected or accrued for an item, no transit authority use tax is due on that item.]

[(D) Collection or accrual of use tax for multiple special purpose districts. If more than one special purpose district use tax is in effect at the location where use of an item occurs, the special purpose district taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all special purpose district taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the district with the earliest effective date would exceed the two percent cap, the tax for that district is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (C) of this paragraph, whether use tax is due for the district that next became effective.]

[(i) If the competing special purpose districts became effective on the same date, the special purpose district taxes are due in the order of the earliest date for which the election in which the district residents authorized the imposition of sales and use tax by the district was held.]

[(ii) If the elections to impose the local taxes were held on the same date, the special purpose district taxes are due in the order of the earliest date for which the enabling legislation under which each district was created became effective.]

[(E) Collection or accrual of use tax for multiple transit authorities. If more than one transit authority use tax is in effect at the location where use of an item occurs, and the two percent cap has not been met, the transit authority taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all transit authority taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the authority with the earliest effective date would exceed the two percent cap, the tax for that authority is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (D) of this paragraph, whether use tax is due for the authority that next became effective.]

[(i) If the competing transit authorities became effective on the same date, the transit authority taxes are due in the order of the earliest date for which the election in which the authority residents authorized the imposition of sales and use tax by the authority was held.]

[(ii) If the elections to impose local taxes were held on the same date, the transit authority use taxes are due in the order of the earliest date for which the enabling legislation under which each authority was created became effective.]

[(2) General use tax rules applied to specific situations. The following fact patterns explain how local use tax is to be collected or accrued and remitted to the comptroller based on, and subject to, the general rules in paragraph (1) of this subsection.]

[(A) Sale consummated outside the state, item delivered from outside the state or from a location in Texas that is not operated by the seller - local use tax due. If a sale is consummated outside of this state according to the provisions of subsection (h) of this section, and the item purchased is either shipped or delivered to a location in this state as designated by the purchaser from a location outside of the state, or if the order is drop shipped directly to the purchaser from a third-party supplier, local use tax is owed based upon the location in this state to which the order is shipped or delivered. If the seller is en-



gaged in business in the local taxing jurisdiction into which the order is shipped or delivered, the seller is responsible for collecting the local use tax due on the sale. If the seller does not collect the local use taxes due on the sale, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller according to the provisions in paragraph (1) of this subsection. For example, if an order for a taxable item is received by a seller at a location outside of Texas, and the order is shipped to the purchaser from a location outside of the state, local use tax is due based upon the location to which the order is shipped or delivered.}]

[(B) Sale consummated in Texas outside a local taxing jurisdiction; item delivered into one or more local taxing jurisdictions - local use tax due. If a sale is consummated at a location in Texas that is outside of the boundaries of any local taxing jurisdiction according to the provisions of subsection (h) of this section, and the order is shipped or delivered to the purchaser at a location in this state that is within the boundaries of one or more local taxing jurisdictions, local use tax is due based on the location to which the items are shipped or delivered. If the seller is engaged in business in the local taxing jurisdiction where the items are shipped or delivered, the seller is responsible for collecting the local use taxes due. If the seller fails to collect any local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller. For example, if a seller uses its own delivery vehicle to transport a taxable item from a place of business that is outside the boundaries of a local taxing jurisdiction to a delivery location designated by a purchaser that is inside the boundaries of a local taxing jurisdiction, the seller is responsible for collecting the local use taxes due based on the location to which the items are delivered.}]

[(C) Sale consummated in any local taxing jurisdictions imposing less than 2.0% in total local taxes - local sales taxes, and possibly use taxes, due. If a sale is consummated at a location in Texas where the total local sales tax rate imposed by the taxing jurisdictions in effect at that location does not equal or exceed 2.0% according to the provisions of subsection (h) of this section, and the item is shipped or delivered to the purchaser at a location in this state that is inside the boundaries of a different local taxing jurisdiction, additional local use tax may be due based on the location to which the order is shipped or delivered, subject to the two percent cap. If the seller is engaged in business in the local taxing jurisdiction into which the order is shipped or delivered, the seller is responsible for collecting any additional local use taxes due. See subsection (g) of this section. If the seller fails to collect the additional local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller. For example, if an order is received in person at a place of business of the seller, such that the sale is consummated at the location where the order is received as provided under subsection (h)(3)(A) of this section, and the local sales tax due on the sale does not meet the two percent cap, additional local use taxes may be due based on the location to which the order is shipped or delivered, subject to the provisions in paragraph (1) of this subsection. Or, if a purchaser places an order for a taxable item at a seller's place of business in Texas, and the seller ships or delivers the item from an out-of-state location to a location in this state as designated by the purchaser, local sales tax is due based upon the location of the place of business where the order is received. If the local sales tax due on the item does not meet the two percent cap, use tax, subject to the provisions in paragraph (1) of this subsection, is due based upon the location where the items are shipped or delivered.}]

(j) Items purchased under a direct payment permit.

(1) When taxable items are purchased under a direct payment permit, local use tax is due based upon the location where the permit holder first stores the taxable items, except that if the taxable items are not stored, then local use tax is due based upon the location

where the taxable items are first used or otherwise consumed by the permit holder.

(2) If, in a local taxing jurisdiction, storage facilities contain taxable items purchased under a direct payment exemption certificate and at the time of storage it is not known whether the taxable items will be used in Texas, then the taxpayer may elect to report the use tax either when the taxable items are first stored in Texas or are first removed from inventory for use in Texas, as long as use tax is reported in a consistent manner. See also §3.288(i) of this title (relating to Direct Payment Procedures and Qualifications) and §3.346(g) of this title.

(3) If local use tax is paid on stored items that are subsequently removed from Texas before they are used, the tax may be recovered in accordance with the refund and credit provisions of §3.325 of this title [(relating to Refunds and Payments Under Protest)] and §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers).

(k) Special rules for certain taxable goods and services. Sales of the following taxable goods and services are consummated at, and local tax is due based upon, the location indicated in this subsection.

(1) Amusement services. Local tax is due based upon the location where the performance or event occurs. For more information on amusement services, refer to §3.298 of this title (relating to Amusement Services).

(2) Cable services. When a service provider uses a cable system to provide cable television or bundled cable services to customers, local tax is due as provided for in §3.313 of this title. When a service provider uses a satellite system to provide cable services to customers, no local tax is due on the service in accordance with the Telecommunications Act of 1996, §602.

(3) Florists. Local sales tax is due on all taxable items sold by a florist based upon the location where the order is received, regardless of where or by whom delivery is made. Local use tax is not due on deliveries of taxable items sold by florists. For example, if the place of business of the florist where an order is taken is not within the boundaries of any local taxing jurisdiction, no local sales tax is due on the item and no local use tax is due regardless of the location of delivery. If a Texas florist delivers an order in a local taxing jurisdiction at the instruction of an unrelated florist, and if the unrelated florist did not take the order within the boundaries of a local taxing jurisdiction, local use tax is not due on the delivery. For more information about florists' sales and use tax obligations, refer to §3.307 of this title (relating to Florists).

(4) Landline telecommunications services. Local taxes due on landline telecommunications services are based upon the location of the device from which the call or other transmission originates. If the seller cannot determine where the call or transmission originates, local taxes due are based on the address to which the service is billed. For more information, refer to §3.344 of this title (relating to Telecommunications Services).

(5) Marketplace provider sales. Local taxes are due on sales of taxable items through a marketplace provider based on the location in this state to which the item is shipped or delivered or at which the purchaser takes possession. For more information, refer to §3.286 of this title.

(6) [(5)] Mobile telecommunications services. Local taxes due on mobile telecommunications services are based upon the location of the customer's place of primary use as defined in §3.344(a)(8) of this title, and local taxes are to be collected as indicated in §3.344(h) of this title.

(7) [(6)] Motor vehicle parking and storage. Local taxes are due based on the location of the space or facility where the vehicle is parked. For more information, refer to §3.315 of this title (relating to Motor Vehicle Parking and Storage).

(8) [(7)] Natural gas and electricity. Any local city and special purpose taxes due are based upon the location where the natural gas or electricity is delivered to the purchaser. As explained in subsection (l)(1) of this section, residential use of natural gas and electricity is exempt from all county sales and use taxes and all transit authority sales and use taxes, most special purpose district sales and use taxes, and many city sales and use taxes. A list of the cities and special purpose districts that do impose, and those that are eligible to impose, local sales and use tax on residential use of natural gas and electricity is available on the comptroller's website. For more information, also refer to §3.295 of this title (relating to Natural Gas and Electricity).

(9) [(8)] Nonresidential real property repair and remodeling services. Local taxes are due on services to remodel, repair, or restore nonresidential real property based on the location of the job site where the remodeling, repair, or restoration is performed. See also subsection (h)(2)(B) [(f)(2)(B)] of this section and §3.357 of this title.

(10) [(9)] Residential real property repair and remodeling and new construction of a real property improvement performed under a separated contract. When a contractor constructs a new improvement to realty pursuant to a separated contract or improves residential real property pursuant to a separated contract, the sale is consummated at the job site at which the contractor incorporates taxable items into the customer's real property. See also subsection (h)(2)(A) [(f)(2)(A)] of this section and §3.291 of this title.

(11) [(10)] Waste collection services. Local taxes are due on garbage or other solid waste collection or removal services based on the location at which the waste is collected or from which the waste is removed. For more information, refer to §3.356 of this title (relating to Real Property Service).

(l) Special exemptions and provisions applicable to individual jurisdictions.

(1) Residential use of natural gas and electricity.

(A) Mandatory exemptions from local sales and use tax. Residential use of natural gas and electricity is exempt from most local sales and use taxes. Counties, transit authorities, and most special purpose districts are not authorized to impose sales and use tax on the residential use of natural gas and electricity. Pursuant to Tax Code, §321.105, any city that adopted a local sales and use tax effective October 1, 1979, or later is prohibited from imposing tax on the residential use of natural gas and electricity. See §3.295 of this title.

(B) Imposition of tax allowed in certain cities. Cities that adopted local sales tax prior to October 1, 1979, may, in accordance with the provisions in Tax Code, §321.105, choose to repeal the exemption for residential use of natural gas and electricity. The comptroller's website provides a list of cities that impose tax on the residential use of natural gas and electricity, as well as a list of those cities that do not currently impose the tax, but are eligible to do so.

(C) Effective January 1, 2010, a fire control, prevention, and emergency medical services district organized under Local Government Code, Chapter 344 that imposes sales tax under Tax Code, §321.106, or a crime control and prevention district organized under Local Government Code, Chapter 363 that imposes sales tax under Tax Code, §321.108, that is located in all or part of a municipality that imposes a tax on the residential use of natural gas and electricity as provided under Tax Code, §321.105 may impose tax on residential use of natural gas and electricity at locations within the district. A list of the

special purpose districts that impose tax on residential use of natural gas and electricity and those districts eligible to impose the tax that do not currently do so is available on the comptroller's website.

(2) Telecommunication services. Telecommunications services are exempt from all local sales taxes unless the governing body of a city, county, transit authority, or special purpose district votes to impose sales tax on these services. However, since 1999, under Tax Code, §322.109(d), transit authorities created under Transportation Code, Chapter 451 cannot repeal the exemption unless the repeal is first approved by the governing body of each city that created the local taxing jurisdiction. The local sales tax is limited to telecommunications services occurring between locations within Texas. See §3.344 of this title. The comptroller's website provides a list of local taxing jurisdictions that impose tax on telecommunications services.

(3) Emergency services districts.

(A) Authority to exclude territory from imposition of emergency services district sales and use tax. Pursuant to the provisions of Health and Safety Code, §775.0751(c-1), an emergency services district wishing to enact a sales and use tax may exclude from the election called to authorize the tax any territory in the district where the sales and use tax is then at 2.0%. The tax, if authorized by the voters eligible to vote on the enactment of the tax, then applies only in the portions of the district included in the election. The tax does not apply to sales made in the excluded territories in the district and sellers in the excluded territories should continue to collect local sales and use taxes for the local taxing jurisdictions in effect at the time of the election under which the district sales and use tax was authorized as applicable.

(B) Consolidation of districts resulting in sales tax sub-districts. Pursuant to the provisions of Health and Safety Code, §775.018(f), if the territory of a district proposed under Health and Safety Code, Chapter 775 overlaps with the boundaries of another district created under that chapter, the commissioners court of each county and boards of the counties in which the districts are located may choose to create a consolidated district in the overlapping territory. If two districts that want to consolidate under Health and Safety Code, §775.024 have different sales and use tax rates, the territory of the former districts located within the consolidated area will be designated as sub-districts and the sales tax rate within each sub-district will continue to be imposed at the rate the tax was imposed by the former district that each sub-district was part of prior to the consolidation.

(4) East Aldine Management District.

(A) Special sales and use tax zones within district; separate sales and use tax rate. As set out in Special District Local Laws Code, §3817.154(e) and (f), the East Aldine Management District board may create special sales and use tax zones within the boundaries of the District and, with voter approval, enact a special sales and use tax rate in each zone that is different from the sales and use tax rate imposed in the rest of the district.

(B) Exemptions from special zone sales and use tax. The sale, production, distribution, lease, or rental of; and the use, storage, or other consumption within a special sales and use tax zone of; a taxable item sold, leased, or rented by the entities identified in clauses (i) - (vi) of this subparagraph are exempt from the special zone sales and use tax. State and all other applicable local taxes apply unless otherwise exempted by law. The special zone sales and use tax exemption applies to:

(i) a retail electric provider as defined by Utilities Code, §31.002;

(ii) an electric utility or a power generation company as defined by Utilities Code, §31.002;

(iii) a gas utility as defined by Utilities Code, §101.003 or §121.001, or a person who owns pipelines used for transportation or sale of oil or gas or a product or constituent of oil or gas;

(iv) a person who owns pipelines used for the transportation or sale of carbon dioxide;

(v) a telecommunications provider as defined by Utilities Code, §51.002; or

(vi) a cable service provider or video service provider as defined by Utilities Code, §66.002.

(5) Imposition of city sales tax and transit tax on certain military installations; El Paso and Fort Bliss. Pursuant to Tax Code, §321.1045 (Imposition of Sales and Use Tax in Certain Federal Military Installations), for purposes of the local sales and use tax imposed under Tax Code, Chapter 321, the city of El Paso includes the area within the boundaries of Fort Bliss to the extent it is in the city's extraterritorial jurisdiction. However, the El Paso transit authority does not include Fort Bliss. See Transportation Code, §453.051 concerning the Creation of Transit Departments.

(m) Restrictions on local sales tax rebates and other economic incentives. Pursuant to Local Government Code, §501.161, Section 4A and 4B development corporations may not offer to provide economic incentives, such as local sales tax rebates authorized under Local Government Code, Chapters 380 or 381, to persons whose business consists primarily of purchasing taxable items using resale certificates and then reselling those same items to a related party. A related party means a person or entity which owns at least 80% of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.

(n) Prior contract exemptions. The provisions of §3.319 of this title (relating to Prior Contracts) concerning definitions and exclusions apply to prior contract exemptions.

(1) Certain contracts and bids exempt. No local taxes are due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of any local tax if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of any local tax if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(2) Annexations. Any annexation of territory into an existing local taxing jurisdiction is also a basis for claiming the exemption provided by this subsection.

(3) Local taxing jurisdiction rate increase; partial exemption for certain contracts and bids. When an existing local taxing jurisdiction raises its sales and use tax rate, the additional amount of tax that would be due as a result of the rate increase is not due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of the tax rate increase if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of the tax rate increase if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(4) Three-year statute of limitations.

(A) The exemption in paragraph (1) of this subsection and the partial exemption in paragraph (3) of this subsection have no effect after three years from the date the adoption or increase of the tax takes effect in the local taxing jurisdiction.

(B) The provisions of §3.319 of this title apply to this subsection to the extent they are consistent.

(C) Leases. Any renewal or exercise of an option to extend the time of a lease or rental contract under the exemptions provided by this subsection shall be deemed to be a new contract and no exemption will apply.

(5) Records. Persons claiming the exemption provided by this subsection must maintain records which can be verified by the comptroller or the exemption will be lost.

(6) Exemption certificate. An identification number is required on the prior contract exemption certificates furnished to sellers. The identification number should be the person's 11-digit Texas taxpayer number or federal employer's identification (FEI) number.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Special Counsel for Tax Administration

Comptroller of Public Accounts

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For further information, please call: (512) 475-2220



## **TITLE 37. PUBLIC SAFETY AND CORRECTIONS**

### **PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE**

#### **CHAPTER 161. COMMUNITY JUSTICE ASSISTANCE DIVISION ADMINISTRATION**

##### **37 TAC §161.21**

The Texas Board of Criminal Justice proposes amendments to §161.21, concerning the Role of the Judicial Advisory Council. The amendments are proposed in conjunction with a proposed rule review of §161.21 as published in another section of the *Texas Register*. The proposed amendments specify that functions of the Judicial Advisory Council include reviewing proposed changes to Texas Department of Criminal Justice (TDCJ) Community Justice Assistance Division (CJAD) standards and making recommendations to the TDCJ CJAD director. The proposed amendments also make minor grammatical updates.

Jerry McGinty, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that for each year of the first five year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses or on rural communities. Therefore, no regulatory flexibility analysis is required.

The anticipated public benefit, as a result of enforcing the rule, will be to clarify the functions of the Judicial Advisory Council. No cost will be imposed on regulated persons.

The rule will have no impact on government growth; no creation or elimination of employee positions; no increase or decrease in future legislative appropriations to the TDCJ; no increase or decrease in fees paid to the TDCJ; no new regulation and no effect on an existing regulation; no increase or decrease in the number of individuals subject to the rule; and no effect upon the economy.

Comments should be directed to the Office of the General Counsel, Texas Department of Criminal Justice, P.O. Box 4004, Huntsville, Texas 77342, [ogccomments@tdcj.texas.gov](mailto:ogccomments@tdcj.texas.gov). Written comments from the general public must be received within 30 days of the publication of this rule in the *Texas Register*.

The amendments are proposed under Texas Government Code §§492.006, 492.013, 493.003(b), 2110.005.

Cross Reference to Statutes: None.

*§161.21. Role of the Judicial Advisory Council.*

(a) Purpose. ~~[Policy.]~~ The Texas Board of Criminal Justice (TBCJ) acknowledges the judiciary's ~~[statutory responsibility and the]~~ valuable and critical role ~~[of the judiciary]~~ in the growth, development, and implementation of community corrections policies and programs in Texas. In accordance with Texas Government Code §493.003(b), ~~the [The]~~ Judicial Advisory Council (JAC) is intended to provide a structure for fulfilling that role.

(b) ~~The [State-level Role of the JAC.]~~ In accordance with Texas Government Code §493.003(b), ~~the~~ function of the JAC is to advise the TBCJ and the Texas Department of Criminal Justice (TDCJ) Community Justice Assistance Division (~~TDCJ~~ CJAD) director on matters of interest to the judiciary. To accomplish this purpose, the JAC shall:

(1) ~~act [Act]~~ as an information exchange and provide expert advice to the TBCJ and the TDCJ CJAD director;

(2) ~~be [Be]~~ given an opportunity to report to the TBCJ at each regularly scheduled meeting on matters of interest to the judiciary, including any item related to the operation of the community justice system~~;~~ ~~as]~~ determined by the JAC chairperson ~~[chairman]~~ to require the TBCJ's consideration; ~~[and]~~

(3) ~~[Conduct a]~~ review ~~[of]~~ requests for funding of community corrections programs and projects received by the TDCJ CJAD, and make recommendations to the TDCJ CJAD director on the funding of reviewed requests, subject to review, ratification, and final approval by the TBCJ, if such approval is required by TBCJ policy; ~~and[-]~~

(4) review proposed changes to the TDCJ CJAD standards and make recommendations to the TDCJ CJAD director.

(c) ~~[Local-level Role of the JAC.]~~ In addition to the duties set out in subsection (b) of this section ~~[rule]~~, the JAC shall:

(1) inform their ~~[Inform and educate, in an appropriate manner, the]~~ constituencies ~~[that its members represent]~~ regarding issues ~~[and procedures]~~ that affect the corrections system of Texas;

(2) coordinate ~~[Coordinate]~~ its activities with the community justice liaison member of the TBCJ, the TDCJ CJAD director, the ~~[local]~~ community supervision and corrections departments (CSCDs), and any other ~~[significant]~~ entities identified by the TDCJ CJAD director or TDCJ ~~[the]~~ executive director ~~[of the TDCJ]; and~~

(3) provide ~~[Provide]~~ a forum for the exchange of information ~~[and a dialogue]~~ with the network of ~~[local]~~ CSCDs on matters involving community corrections programs.

(d) ~~[Additional Authority of the JAC.]~~ The JAC chairperson ~~[chairman]~~ may appoint committees of council members or advisory groups as appropriate ~~[of non-JAC members]~~ to achieve the purposes of this section ~~[rule]~~. The JAC chairperson ~~[chairman]~~ shall consult with the TDCJ CJAD director regarding the scheduling of meetings of the JAC, JAC committees ~~[of the JAC]~~, or JAC advisory groups ~~[to the JAC]~~, to ensure arrangements can be made and sufficient funds exist to allow reimbursement of expenses for attendance, as ~~[where]~~ authorized by law.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 13, 2019.

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Erik Brown

Director of Legal Affairs

Texas Department of Criminal Justice

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For further information, please call: (936) 437-6700

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